Criminal Law Symposium

Jury Management

Reference

- Model Civil Jury Instructions: Proposed amendments relating to juror misconduct and juror communications during deliberations

- Principles for Juries & Jury Trials, American Bar Association (2005)

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FROM THE COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS

The Committee solicits comment on the following proposals by February 15, 2006. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Model Civil Jury Instructions Committee, Michigan Hall of Justice, P.O. Box 30104, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

The Committee on Model Civil Jury Instructions is considering the adoption of two amended instructions relating to reporting juror misconduct and communication by jurors during deliberations.

[AMENDED] M Civ JI 2.07
Jurors Not to Consider Information Received Outside Presence of Court

M Civ JI 2.07
Jurors Not to Consider Information Received outside Presence of Court

The only information that you will receive about this case should come to you in this courtroom. You must not consider any information which may come to you outside this courtroom.

*(You must not read newspaper headlines or articles relating to the trial. Also you must not watch or listen to television and radio comments or accounts of the trial while it is in progress.)

*(You must not visit the scene of the occurrence that is the subject of this trial. If it should become necessary that you view or visit the scene, you will be taken as a group. You must not consider as evidence any personal knowledge you have of the scene.)

You must not make any investigations on your own or conduct any experiments of any kind.

If you discover a juror has violated my instructions, you should report it to me.

Note on Use
*The paragraphs in parentheses should be used if applicable. If it is expected that the jury will view or visit the scene, the second paragraph in parentheses may be expanded by the

addition of pertinent parts of M Civ JI 3.12.

History
Amended January 1993.

[AMENDED] M Civ JI 60.01
Jury Deliberations

M Civ JI 60.01
Jury Deliberations

When you go to the jury room, your deliberations should be conducted in a businesslike manner. You should first select a foreperson. She or he should see to it that the discussion goes forward in an orderly fashion and that each juror has full opportunity to discuss the issues.

When at least five of you agree upon a verdict, it will be received as your verdict. In your deliberations, you should weigh the evidence with an open mind and consideration for each other's opinions.

If differences of opinion arise, you should discuss them in a spirit of fairness and frankness. You should express not only your opinion but also the facts and reasons upon which you base it.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender your honest conviction as to the weight and effect of the evidence or lack of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

If you wish to communicate with me or examine the exhibits while you are deliberating, please have your foreperson write a note and give it to the bailiff.

During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands. Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

During your deliberations you may not communicate with persons outside the jury room (other than the Judge), by any means, including cellular telephones or other electronic devices.

If you discover a juror has violated my instructions, you should report it to me.

Note on Use
If, after reasonable deliberation, the jury reports an inability to agree or fails to return a verdict, then the Court may also give M Civ JI 60.02.

Comment
MCL 600.1352 and MCR 2.512(A) now provide for trial by a jury of six in civil cases, with a verdict to be received when five jurors agree. An exception is made for civil actions for commitment of a person to a mental, correctional or training institution, which require a unanimous verdict. MCR 5.740(C); MCL 600.1352.

History
M Civ JI 60.01 was SJI 1.05.
Amended January 1982, April 1986, October 1993.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.516(D). In drafting Model Civil Jury Instructions, it is not the Committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The Committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chair: Hon. William J. Giovan

Reporter: Timothy J. Raubinger

Members: Jeffrey A. Brantley; Hon. Alfred M. Butzbaugh; Hon. Pat M. Donofrio; Timothy J. Donovan; Mark R. Granzotto; Elizabeth Phelps Hardy: Hon. John A. Hohman, Jr.; Maurice G. Jenkins; Steven W. Martineau; Gregory L. McClelland; David S. Mittleman; Hon. Christopher M. Murray; Hon. Wendy L. Potts; Michael B. Rizik, Jr.; Mary Massaron Ross; Kelvin W. Scott; Hon. Deborah A. Servitto; Scott C. Strattard; Hon. Brian R. Sullivan; Susan H. Zitterman.

PRINCIPLES FOR Juries & Jury Trials

AMERICAN BAR ASSOCIATION

AUGUST 2005

The American Bar Association would like to thank Thomson West for its generous support in the publishing of this document.

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The Principles, which appear in bold type, were adopted as ABA policy in February 2005. The accompanying commentary has not been adopted by the ABA House of Delegates and, as such, should not be construed as representing the policy of the Association.

AMERICAN JURY PROJECT

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PREAMBLE

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system. Each Principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated that over the course of the next decade jury practice will improve so that the Principles set forth will have to be updated in a manner that will draw them ever closer to the ideals to which we aspire.

General Principles

PRINCIPLE 1—THE RIGHT TO JURY TRIAL SHALL BE PRESERVED

A. Parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with law.

B. Parties, including the state, have the right to a fair, accurate and timely jury trial in criminal prosecutions in which confinement in jail or prison may be imposed.

C. In civil cases the right to jury trial may be waived as provided by applicable law, but waiver should neither be presumed nor required where the interests of justice demand otherwise.

D. With respect to criminal prosecutions:

1. **A defendant's waiver of the right to jury trial must be knowing and voluntary, joined in by the prosecutor and accepted by the court.**
2. **The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver, personally waives the right to trial by jury in writing or in open court on the record.**
3. **A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of trial.**
4. **A defendant may withdraw a waiver of jury, and the prosecutor may withdraw its consent to a waiver, both as a matter of right, if there is a change of trial judge.**

E. A quality and accessible jury system should be maintained with budget procedures that will ensure adequate, stable, long-term funding under all economic conditions.

Comment

Subdivision A.

The Seventh Amendment of the United States Constitution guarantees the right to jury trials in civil cases in federal court.

The right is such "a basic and fundamental feature of our system of federal jurisprudence" that it "should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U.S. 752, 753 (1942). The federal guarantee has not, however, been extended to civil cases in state courts. *See Gasperini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415, 432 (1996); *see also Minneapolis & St. Louis. R.R. Co. v. Bombolis,* 241 U.S. 211, 217 (1916). Nevertheless, although the strength of the guarantee varies, "[a]lmost without exception," state constitutions or statutes guarantee trial by jury in civil cases as well. GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 57 (1977); *see* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 793 (2004). In most states, the right to a jury trial is guaranteed for cases above the level of small claims court. *See* American Judicature Society, *Juries in-depth: Right To a Jury Trial*, *available at* http://www.ajs.org/jc/juries/jc_right_overview.asp.

The aspiration of subdivision A. is to extend the right to jury trial in civil cases to the furthest point allowed by law while acknowledging that this aspiration exceeds the mandate of the Seventh Amendment, as currently interpreted by the Supreme Court, as well as the law in some states.

Subdivision B.

This subdivision is drawn from Standard 15-1.1 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

The Sixth Amendment of the United States Constitution guarantees that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. In *Duncan v. Louisiana*, the Supreme Court extended the constitutional guarantee to criminal cases in state courts. 391 U.S. 145, 149 (1968). It stated that "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth

Amendment, and it must therefore be respected by the States." *Id.* at 156-58. Today, in state or federal court, a defendant in a criminal action "is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." *Blanton v. N. Las Vegas,* 489 U.S. 538, 542 (1989).

Recognizing that punishments of less than six months' imprisonment can be quite serious to the individual, subdivision B. articulates a broader right to jury trial than is protected by current constitutional law. Although the specter of imprisonment may not be considered serious by some, incarceration for any period of time would be viewed as catastrophic by many and warrants a jury trial. This subdivision also recognizes that the availability of jury trial is beneficial to the prosecution and to society as a whole, not simply the accused. Accordingly, subdivision B. provides that the right should be available to both the prosecution and the defense.

Subdivision C.

Although there is a constitutional or statutory right to jury trial in civil cases, the Supreme Court has long recognized that a private litigant may waive its right to a jury in such matters. *See Commodity Futures Trading Comm'n. v. Schor,* 478 U.S. 833, 848 (1986); *see also D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (permitting contractual waiver of due process rights). Waiver requires that the party waving such right do so "voluntarily" and "knowingly" based on the facts of the case and as provided by the law. *D.H. Overmyer Co.*, 405 U.S. at 185-86. Waiver should neither be presumed nor required where the interests of justice demand otherwise.

Subdivision D.

This subdivision is drawn from Standard 15-1.2 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Subsection D.1 reflects the accepted rule that waivers of right to trial by jury "not only must be voluntary but must be knowing,

intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748-49 (1970) (citations omitted). Whether a waiver is voluntary or knowing can be determined only by considering all of the relevant circumstances surrounding it. *Id.*

Further, a waiver by the defendant of his constitutional right to trial by jury may be subject to consent by both the prosecuting attorney and the trial court. *Adams v. United States ex rel. McCann,* 317 U.S. 269, 277-78 (1942) (waiver contingent upon government attorney and trial court's consent). In *Singer v. United States,* the Court held that, because a "defendant's only constitutional right concerning the method of trial is to an impartial trial by jury," it did not find any "constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him." 380 U.S. 24, 35-36 (1965). Yet, there can be extraordinary circumstances, such as the unavailability of an impartial jury, that would warrant a defendant's waiver of his constitutional right over the objections of the prosecutor. *See Id.* at 37-38. It should be noted that pursuant to statutory enactment in certain jurisdictions, prosecutors are not afforded an opportunity either to endorse or reject a defendant's jury waiver request. It is not the aim of this subdivision to undermine the considered policy decisions reflected in such legislation.

Subsection D.2 recognizes that an effective waiver of the right to a jury trial must be knowing and voluntary and that, in a criminal trial, the consequences of such a waiver can be especially severe because the defendant's freedom may be at stake. The defendant must decide whether or not to waive his right to a jury trial; it is not a tactical decision to be left solely to defense counsel. *See Brockhart v. Janis*, 384 U.S. 1 (1966). Thus, subsection D.2 requires that the defendant be advised of his right to a jury trial and of the consequences of any waiver of that right, and that he make any waiver personally either in writing or in open court on the record. Mere acquiescence in or failure to object to a non-jury trial is not a sufficient waiver. *Douglass v. First Nat'l Realty*

Corp., 543 F.2d 894, 899 n.37 (D.C. Cir. 1976); *United States v. Saadya*, 750 F.2d 1419, 1422 (9th Cir. 1985).

In addition, recognizing that pro se defendants are especially at risk of making non-knowing waivers, this subsection urges that judges, prior to accepting a waiver, inform pro se defendants, on the record, of the fundamental attributes of jury trial, including the number of jurors, the nature of the selection process and the defendant's role in that process, the unanimity requirement, and the fact that the judge will decide guilt or innocence if the defendant waives his right to a jury trial. *See Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993).

Subsection D.3 recognizes that a defendant may withdraw his knowing and voluntary waiver, but also limits that right, adopting the prevailing view that such withdrawal is conditioned on the court's approval. *See, e.g., Wyatt v. United States*, 591 F.2d 260 (4th Cir. 1979). *See generally* H. H. Henry, Annotation, *Withdrawal of Waiver of Right to Jury Trial in Criminal Case*, 46 A.L.R. 2d 919 (1956). The contrary view has been rejected lest the defendant's absolute power to withdraw his waiver be exercised tactically or arbitrarily resulting in unreasonable delay and inconvenience.

Subsection D.4 does, however, recognize one situation in which either party should have an absolute right to withdrawal of a jury trial waiver. With the substitution of the trial judge, the premise upon which jury trial was waived has changed. The underlying philosophy establishing trial by jury as the preferred mechanism for resolution of a criminal case should take precedence over the desire for efficiency in administration in this situation.

Subdivision E.

This subdivision recognizes the practical financial considerations affecting our justice system. Because the jury trial is a fundamental component of that justice system, budget procedures should be established that ensure adequate, stable and long-term funding to maintain the jury system. Michael L. Buenger, *Of Money & Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?* 92 Ky. L.J. 979, 981-93

(2003-04). Failure to do so may result in the sacrifice of justice in the name of economy. Judges facing such situations may be forced to delay trials and, in criminal cases, deny the accused their Sixth Amendment rights, creating a crisis of constitutional proportions. *See* Gordon Bermant & Russell Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability,* 46 MERCER L. REV. 835, 848 (1995). Budgetary concerns should never compromise constitutional protections or a judge's control over the essential aspects of the courtroom. *See Id*. Nor should fees or charges be levied which unreasonably interfere with access to jury trial.

PRINCIPLE 2—CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:

1. **Are less than eighteen years of age; or**
2. **Are not citizens of the United States; or**
3. **Are not residents of the jurisdiction in which they have been summoned to serve; or**
4. **Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or**
5. **Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.**

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

C. The time required of persons called for jury service should be the shortest period consistent with the needs of justice.

1. **Courts should use a term of service of one day or the completion of one trial, whichever is longer.**
2. **Where deviation from the term of service set forth in C.1. above is deemed necessary, the court should not require a person to remain available to be selected for jury service for longer than two weeks.**

D. Courts should respect jurors' time by calling in the minimum number deemed necessary and by minimizing their waiting time.

1. **Courts should coordinate jury management and calendar management to make effective use of jurors.**
2. **Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of persons summoned for jury duty and the number assigned to jury panels.**

3. Courts should ensure that all jurors in the courthouse waiting to be assigned to panels for the first time are assigned before any juror is assigned a second time.

E. Courts should provide an adequate and suitable environment for jurors, including those who require reasonable accommodation due to disability.

F. Persons called for jury service should receive a reasonable fee.

1. Persons called for jury service should be paid a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care. Courts should be encouraged to increase the amount of the fee for persons serving on lengthy trials.

2. Employers should be prohibited from discharging, laying off, denying advancement opportunities to, or otherwise penalizing employees who miss work because of jury service.

3. Employers should be prohibited from requiring jurors to use leave or vacation time for the time spent on jury service or be required to make up the time they served.

Comment

Subdivision A.

This subdivision is drawn from Standard 4 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision, as well as subdivisions B. and C. below, are designed to extend the privilege and responsibilities of jury service to as broad a segment of the population as is possible. The imposition of myriad eligibility requirements not only adversely affects the inclusiveness of the jury selection process, but may also increase the cost of administering the jury system. Hence, the qualifications for jury service listed in this subdivision are limited to those five that are essential to maintaining the integrity of the judicial process.

The first limitation on eligibility is that only persons age eighteen and over should be permitted to serve on a jury. All but three states set the minimum age at 18. No maximum age is recommended because it would be inappropriate to exclude older Americans as a group—most are able and willing to serve.

The second limitation is that a person must be a citizen of the United States to serve as a juror. This requirement is already imposed in most states either by law or in fact through reliance upon the voter registration list as the primary source of potential jurors.

The third limitation is that all prospective jurors must be residents of the jurisdiction in which they have been summoned to serve. In accordance with the statutes of most states, this subsection recommends no minimum period of residence. Courts have ruled lengthy periods of residency unconstitutional as prerequisites for voting and receiving public assistance. *Memorial Hosp. v. Maricopa County*; 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). Therefore, the term "resident" refers to all persons living in the jurisdiction and includes students attending local universities, and military personnel and their dependents who live in the community.

The fourth limitation is that prospective jurors must be able to communicate in the English language or the court must provide a satisfactory interpreter. The purpose of using the word "communicate" is to minimize the possibility of bias and discrimination in the jury selection process based on disabilities that interfere with potential jurors speaking in English. For instance, courts have found that a juror's hearing impairment did not disqualify the juror nor did an interpreter's presence during jury deliberations deprive the defendant of a fair trial. *United States v. Dempsey,* 830 F.2d 1084 (10th Cir. 1987). In addition, the option of using an interpreter is included to allow for non-English speakers to serve on juries. In New Mexico, the right of citizens of the state to serve on juries cannot be restricted on the basis of an inability to speak, read or write English or Spanish. N.M. CONST. art. VII, § 3.

The fifth limitation is that prospective jurors have not been convicted of a felony and are not in confinement or under supervision such as probation or parole. Felons are disqualified in 31 states and in federal courts from ever serving on a jury. This subsection adds the proviso that in addition to a felony conviction, the disqualified individual must also be under court or penal supervision. It has been argued that the presence of felons on juries

may undermine the public's respect for the process or inject bias into jury deliberations. However, the desire for a jury representative of the population may be thwarted if large groups of citizens are automatically debarred from service. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

Subdivision B.

This subdivision is drawn from Standard 1 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

Jury duty is both a civic responsibility and an obligation of all qualified citizens. It is also a constitutional right of citizens recognized by the Supreme Court. *Powers v. Ohio*, 499 U.S. 400 (1991). The subdivision stresses that each group and individual should have the opportunity for jury service, and that none should be excluded. By ensuring that everyone has the opportunity to serve, a court not only increases the number of individuals serving as jurors, but also increases the representative nature of the panel. Along those lines, the Supreme Court has held that a *prima facie* violation of the fair cross-section requirement is shown when a distinctive group in the community is not represented in the pool from which juries are selected in a fair and reasonable relationship to the number of such persons in the community; and the under-representation is due to the systematic exclusion of the group in the jury selection process. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979). In addition, under the Americans with Disabilities Act of 1990, persons with disabilities must be afforded equal opportunities to serve, and must remain on the list of eligible jurors. 42 U.S.C. §§ 12101-12213.

The subdivision places on the court, the commission, or the individual responsible for managing the jury selection process the duty to avoid any practices or procedures that are discriminatory in purpose or effect. It urges the entity or individual responsible for jury operations to remain alert and sensitive to measures that may limit the opportunity of segments of the community to serve on a jury. The duty to avoid discriminatory practices applies at all stages of the jury selection process, including, but not limited to

the selection of names from the source list and the master list, the granting of excuses and deferrals and the exercise of peremptory challenges.

Subdivision C.

This subdivision is drawn from Standard 5 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision recommends that jurisdictions reduce to the shortest duration feasible both the period of time during which persons are required to remain available for jury duty and the time spent at the courthouse. The length of the jury term has a substantial impact on several aspects of jury management. *See* JANICE T. MUNSTERMAN ET AL., NATIONAL CENTER FOR STATE COURTS, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE (1991) [hereinafter RELATIONSHIP]. The subdivision recognizes that reducing the term of jury service is essential to achieving a representative and inclusive jury. A shortened term would minimize or practically eliminate the inconvenience and hardship presented by jury duty and thus would justify the application of a strict excuse policy. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § II-2 (G. Thomas Munsterman et al., eds. 1997) [hereinafter INNOVATIONS].

In addition to diminishing representativeness and inclusiveness, lengthy terms of juror service, when combined with inefficient use of prospective jurors, lead to juror frustration and dissatisfaction with the jury system and with the judicial system in general. *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 283 (Robert Litan, ed., 1993). A shortened jury term encourages more efficient use of jurors and reduces the amount of time they spend waiting to be used, thus recognizing that citizens are making an important contribution and their time is valuable.

This subdivision also attempts to alleviate the inconvenience of remaining available for service for several weeks or months by recommending that jurisdictions not require persons to remain available for jury service for more than two weeks and consider

placing a limitation on the number of times a juror can be called. This would relieve the hardship and inconvenience to both the individual and the employer. G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT, Elem. 6, (1996) [hereinafter MANAGEMENT].

Subdivision D.

This subdivision is drawn from Standard 13 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision recognizes the need to balance the supply of prospective jurors at the courthouse with the actual number required to accommodate scheduled trial activity and to employ prospective jurors' service so as to achieve the best use of their time.

Inefficient scheduling practices, such as scheduling voir dires to begin simultaneously, create a heavy demand on the jury pool for short periods of time and usually result in the need to summon a larger pool to accommodate these anticipated trial starts. Staggering trial starts so that judges do not simultaneously call for panels of jurors, thereby depleting the pool, is one way to alleviate demands on the pool and to achieve a high rate of juror use. Another method is to maintain continuous court operation by scheduling bench trials and other activities around jury trials so that the demand for jurors is spread more evenly throughout the day, the week and the term. Although jury panels must be large enough to permit the selection of a trial jury after the parties have exercised their challenges, panels frequently include substantially more people than are needed to cover allowable challenges. Reducing the panel size to the minimally sufficient number of prospective jurors increases efficient juror use. Courts should set a standardized size for panels in a given type of case after analyzing data of past juror use. In general, courts that have reduced their panel sizes have found them sufficient to meet most of their needs for jurors with little or no delay. Furthermore, setting a standardized size for panels is essential to effective jury management so that judges and court administrators recognize the importance of improved juror use and its crucial impact on both the

overall cost and efficiency of jury system operations and the public's attitude toward jury duty. MANAGEMENT, *supra,* Elem. at 7-12.

As a matter of the proper usage of prospective jurors' time, each prospective juror in the courthouse waiting to be assigned to a panel for the first time should be so assigned before any juror is assigned a second time.

Subdivision E.

This subdivision is drawn from Standard 14 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

The court should make all facilities accommodating to all jurors, including those with disabilities. Adequate facilities play an integral part in the realization of an efficient, well-managed jury operation. Poor spatial arrangement and unsatisfactory environmental conditions, in addition to inadequate facilities, can reduce the efficiency of operations. Inadequate attention to the accessibility of courthouse facilities can reduce the representativeness of the jury pool by, in effect, excluding many otherwise eligible persons whose mobility is impaired. This subdivision also recognizes the need for an adequate and suitable environment for jurors, to allow them to wait in comfort, safety and dignity. *See* DON HARDENBERGH, THE COURTHOUSE: A PLANNING AND DESIGN GUIDE FOR COURTHOUSE FACILITIES (2d ed., 1998).

Subdivision F.

This subdivision is drawn from Standard 15 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

While the daily fee paid to individual jurors is generally quite low, the aggregate cost of compensating jurors constitutes a significant percentage of the court budget in most jurisdictions. The minimal size of the daily fee means that "[f]ew persons making more than the minimum wage can afford [the] . . . sudden and involuntary cut in pay" imposed by jury service. JON VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 11 (1977). As a result, excuses from jury

service because of economic hardship are common in many jurisdictions for laborers, sales people, unemployed parents with childcare expenses, and sole proprietors of small businesses. RELATIONSHIP, *supra*. This not only reduces the representativeness of the jury pool but, when coupled with the length of the term of service in many jurisdictions, transfers a significant portion of the cost of public service to private industry. INNOVATIONS, *supra*, at § II-3.

Citizens should not be penalized for fulfilling their civic duty to serve as jurors. Employers should be prohibited from discharging, laying off, denying advancement opportunities to or otherwise penalizing employees who miss work because of jury service. Some jurisdictions have gone so far as to grant a statutory right of action for monetary damages as well as equitable remedies in such situations. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JURY SELECTION AND SERVICE ACT, § 17 (1986); D.C. CODE ANN., § 11-1913 (2001); NEB. REV. STAT., § 25-1640 (1989). Fortunately, most medium and large size organizations maintain the salary of those on jury duty. Several states mandate that jurors be paid their salary or wages. Some of these have provisions that relieve the employer of such an obligation after a specified number of days. The Supreme Court has upheld such a statutory arrangement in Alabama. *Dean v. Gadsden Times Publ'g. Corp.*, 412 U.S. 545 (1973).

PRINCIPLE 3—JURIES SHOULD HAVE 12 MEMBERS

A. Juries in civil cases should be constituted of 12 members wherever feasible and under no circumstances fewer than six members.

B. Juries in criminal cases should consist of:

1. Twelve persons if a penalty of confinement for more than six months may be imposed upon conviction;

2. At least six persons if the maximum period of confinement that may be imposed upon conviction is six months or less.

C. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of fewer jurors than required for a full jury, but in no case fewer than six jurors. In criminal cases the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to trial by a full jury, and the consequences of waiver, personally waives the right to a full jury either in writing or in open court on the record.

Comment

Subdivision A. and B.

These subdivisions are drawn from Standard 17 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and Standard 15-1.1 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to jury trial in non-petty criminal cases. The Seventh Amendment guarantees that right in federal civil cases. As historically understood this guarantee required a jury "composed of not less than twelve persons." *Thompson v. Utah*, 170 U.S. 343, 350 (1898). In 1970, for the first time, the Supreme Court retreated from the requirement of a jury of twelve. *Williams v. Florida*, 399 U.S. 78, 102 (1970). The Court eventually concluded that juries with as few as, but no fewer than, six members are constitutional in state criminal cases. *Ballew v. Georgia*, 435 U.S. 223 (1978). It also held that juries with fewer than twelve members are constitutional in federal civil cases. *Colgrove*

v. Battin, 413 U.S. 149 (1973). The Court's decisions were, in large measure, based on empirical studies that disputed the impact of jury size on effective decision making, on representativeness and on efficiency. *Id.* at 160. The shortcomings of those studies have been demonstrated by subsequent scholarly analysis. *See* Hans Zeisel & Shari Seidman Diamond, "*Convincing Empirical Evidence,*" 41 U. CHI. L. REV. 281 (1974); Committee on Federal Civil Procedure, *Report on the Importance of the Twelve—Member Civil Jury in the Federal Courts*, 205 F.R.D. 247, 266 n.126 and accompanying text [hereinafter Comm. on Fed. Civ. Pro.]; Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov./Dec. 1974, at 18-20; Note, *Developments in the Law—The Civil Jury,* 110 HARV. L. REV. 1408, 1479-84 (1997). Moreover, the Court itself acknowledged the empirical findings pointing to the superiority of twelve member juries over six member juries in *Ballew* when it concluded that juries of fewer than six are unconstitutional. *Ballew v. Georgia*, 435 U.S. 223, 237-38 (1978).

In light of history and the empirical data these Principles seek to encourage a return to the twelve person jury in all non-petty criminal cases and in all civil cases wherever feasible. Studies have established that there are significant differences between the effectiveness of six and twelve member juries. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 670 (2001); Michael J. Saks, *The Smaller the Jury the Greater the Unpredictability*, 79 JUDICATURE 263 (1996) [hereinafter "*Unpredictability*"]. Larger juries deliberate longer, and have better recall of trial testimony. *Unpredictability, supra,* at 264-65. Thus, they are more likely to produce accurate results. Angelo Valenti & Leslie Downing, *Six Versus Twelve Member Juries; An Experimental Test of the Supreme Court Assumption of Functional Equivalence,* 1 PERS. & SOC. PSYCHOL. BULL. 273, 274 (1974). By contrast, smaller civil juries are more likely to produce a number of outlier awards that do not reflect community values. *Unpredictability*, *supra,* at 263; Devine et al., *supra,* at 670. Evidence also suggests the logical corollary, that larger juries in criminal cases are more likely to return verdicts in accord with community values. MICHAEL J. SAKS, THE ROLE OF GROUP SIZE AND SOCIAL

DECISION RULE (1977); REID HASTIE ET AL., INSIDE THE JURY 45-58 (1983).

The smaller the size of the jury, the less representative it becomes. *Colgrove v. Battin*, 413 U.S. 149, 167 n.1 (1973) (Marshall, J., dissenting); *Unpredictability*, *supra,* at 264; E. THOMAS MUNSTERMAN ET AL., A COMPARISON OF THE PERFORMANCE OF EIGHT AND TWELVE-PERSON JURIES (1990). A jury of one's peers must be representative of the community lest it become a means of tyranny by the majority. Maintaining the representative nature of the jury is essential to preserving its fairness and legitimacy in the eyes of the public. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1317 (2000). Twelve person juries are significantly more likely to facilitate representation of minority voices. For example, in a community with a 10 percent minority population a twelve person jury is 25 percentage points more likely to contain a member of that group than is a six person jury (72 percent of twelve person juries v. 47 percent of six person juries). *Unpredictability*, *supra,* at 264.

Some decrease in hung juries is likely to occur with smaller juries. Michael J. Saks & Mollie W. Marti, *A Meta-Analysis of the Effects of Jury Size,* 21 LAW AND HUM. BEHAV. 451, 469-461 (1997). Fewer jurors must agree to reach a verdict on a smaller jury, and the smaller jury is less likely to include multiple jurors who do not share the position of the majority, decreasing the strength of the psychological position of the minority. With the effectiveness of the minority reduced, deadlocks are less likely. The modest reduction in hung juries in criminal cases that the smaller jury offers must be evaluated in light of the threat to representativeness and reliability associated with the drop in jury size. Moreover, research indicates that hung juries are most likely to occur in cases that judges and jurors view as ambiguous or close, suggesting that they may warrant a second look. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? (2002). Hung juries are rare in civil cases, so the effect of jury size on the rate of hung juries is likely to influence fewer outcomes in civil as opposed to criminal cases.

In contrast to the preliminary studies cited by the Supreme Court, subsequent research has found that six person juries are

only minimally more efficient or cheaper than twelve person juries. *Developments in the Law*, *supra,* at 1489 (1997); William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man Versus Twelve Man Juries*, 14 WM. & MARY L. REV. 326, 327 (1972); John T. Burke & Francis P. Smith, *Jury of Twelve—No Accident*, 42 INS. COUNS. J. 213 (1975); Hanz Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 711-712 (1971). Any time savings resulting from smaller juries are likely to occur in the impaneling and deliberation stages of the trial. Data show that the additional time spent in the impaneling stage is insignificant. Pabst, *supra,* at 327; Comm. on Fed. Civ. Pro., 205 F.R.D. at 247. Similarly, studies indicate that differences in deliberation time are small. Devine et al., *supra,* at 670; MUNSTERMAN ET AL., *supra*. Overall, little court time is saved by reducing jury size. Comm. on Fed. Civ. Pro., 205 F.R.D. at 247; INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX AND TWELVE MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); Edward Beiser & Rene Varrin, *Six Member Juries in the Federal Courts*, 58 JUDICATURE 428 (1975).

Consistent with long-standing ABA policy, these Principles are most insistent that all serious criminal cases (with a penalty of confinement of more than six months) be tried to a jury of twelve because of the particular opprobrium and the threat to liberty inherent in such convictions as well as the threat to society posed by an unwarranted acquittal. While such considerations may be somewhat moderated in civil cases and with respect to petty offenses, both will frequently have the most profound effect on those involved. Moreover, deviant jury awards, more likely with smaller juries, can undermine the legitimacy of the civil jury. The principle established with respect to serious offenses should be viewed as militating for a return to twelve person juries in all settings.

It should be emphasized that the preference expressed in these Principles for the twelve person jury is premised on colonial and federal constitutional considerations, long historical experience and the best empirical evidence currently available. In expressing that preference these Principles do not seek to deny that legitimate

alternative views regarding jury size exist nor to suggest the illegitimacy of alternative constitutional commitments existing in a number of states.

Subdivision C.

This subdivision is drawn from Standard 15-1.3 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996) and extends that Standard to civil cases as well as imposing a floor of six on the number of jurors that may be agreed to by stipulation.

The subdivision permits reduction of jury size where all the parties agree to such a reduction and the court approves it. Waivers of a jury of twelve have been approved by the Supreme Court. *Patton v. United States*, 281 U.S. 276 (1930). Agreement to reduce the jury's size can be made at any time before verdict and can be made contingent upon one or more jurors becoming unavailable due to illness or emergency.

In criminal cases, stipulations cannot be approved unless the court has advised the defendant both of his or her right to a full jury and the consequences of waiver, and the defendant then personally waives that right in writing or in open court. The requirements to obtain a stipulation for reduction in the size of the jury are necessarily stricter in criminal cases because of the heightened threat to individual liberty. A lawyer's representation of a client's consent is not "personal" consent. *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971). Where the stipulation is made orally in court, the record must clearly reflect the defendant's personal express and knowing consent to the stipulation. *Id.*; *Rogers v. United States*, 319 F.2d 5 (7th Cir. 1963). These requirements should be strictly enforced. *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), *aff'd*, 471 U.S. 773 (1985).

PRINCIPLE 4—JURY DECISIONS SHOULD BE UNANIMOUS

A. In civil cases, jury decisions should be unanimous wherever feasible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors. In no civil case should a decision concurred in by fewer than six jurors be accepted, except as provided in C. below.

B. A unanimous decision should be required in all criminal cases heard by a jury.

C. At any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict. In criminal cases, the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to a unanimous decision, personally waives that right, either in writing or in open court on the record.

Comment

Subdivisions A. and B.

These subdivisions are drawn from Standard 17 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and Standard 15-1.1 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

At least as early as the fourteenth century it was agreed that jury verdicts should be unanimous. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 586 (1993). This proposition was specifically embraced by the Supreme Court in *American Publishing Co. v. Fisher*, 166 U.S. 464, in 1897. It stood until 1972, when the Court decided that less than unanimous verdicts are permissible in state court criminal proceedings. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court upheld an eleven-to-one verdict, while in *Johnson v. Louisiana*, 406 U.S. 356 (1972), it accepted a nine-to-three verdict. These decisions left open the question of just

how small a jury majority could be and still satisfy constitutional constraints. In criminal matters, the Supreme Court has provided at least a partial answer. In *Burch v. Louisiana*, 441 U.S. 130 (1979), the court held that conviction by a vote of five-to-one is unacceptable because it yields less than six votes for conviction, thereby trenching upon the principle established in *Ballew v. Georgia*, 435 U.S. 223 (1978). Still unanswered are questions about the validity of votes like eight-to-four and seven-to-five. These numerical questions point up the absence of any clearcut rationale for the Supreme Court's preference.

The historical preference for unanimous juries reflects society's strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community. Implicit in this preference is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions—ones that address and persuade every juror. Empirical assessment tends to support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001). In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached. *Id.*

Unanimous verdicts also protect jury representativeness—each point of view must be considered and all jurors persuaded. Studies have shown that minority jurors participate more actively when decisions must be unanimous. REID HASTIE ET AL., INSIDE THE JURY 45-58 (1983); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 2, 23 (2001); Dennis J. Devine et al., *supra,* at 669. A non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation. This fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1315 (2000).

There is a fear that a unanimity rule will result in more hung juries. This fear is overstated. Juries rarely hang because of one or two obstinate jurors. *Id.* at 1317; HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY, 462-63 (1966). A survey of trial judges found that, where unanimous verdicts were required, 5.6 percent of juries ended in deadlock, compared with 3.1 percent where majority verdicts were permitted. KALVEN & ZEISEL, *supra*. Generally, when deadlocks occur, they reflect genuine disagreement over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM?, 67 (2002); REID HASTIE, ET AL., *supra,* at 166-167; Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions,* 6 S. CAL. INTERDISC. L.J. 1, 41 (1997). Moreover, the cost of hung juries should not be overstated. Only one-third of the cases resulting in hung juries are retried. Half are disposed of by plea agreements or dismissals. HANNAFORD-AGOR ET AL., *supra,* at 83-84.

A unanimous verdict should be required in all criminal cases. This requirement reflects the established practice in federal criminal trials. FED. R. CRIM. P. 31(2) (2004). In criminal trials, there is a heightened need for accuracy and for a representative panel because a person's liberty is at risk and society faces the threat of mistaken acquittal or conviction, both of which undermine faith in the justice system. The need for unanimity has been recognized as compelling by the Supreme Court, where only six jurors are impaneled. *Burch*, 441 U.S. at 139.

As in criminal cases, the preference for unanimous verdicts in civil cases is intended to ensure an accurate and representative verdict. However, it has been held that less than unanimous verdicts are permissible because civil trials require a lesser standard of proof and have traditionally been afforded more procedural flexibility than criminal litigation. *See In re Winship,* 397 U.S. 358, 371-72 (1970) (Harlan J., concurring). Nonetheless, the need for accuracy, representativeness and public confidence in verdicts all argue for the unanimity standard in civil cases. In deference to local variation on this question, the present subdivision proposes that, in no case should a verdict be accepted that is concurred in

by less than five-sixths of the jurors. Thus, on a jury of twelve, there may be no more than two dissenting votes; on a jury of fewer than twelve, no more than one dissenter. On a jury of six, the subdivision requires unanimity.

The requirement that jurors deliberate for a reasonable period of time helps to ensure that minority voices will be heard during deliberations, even if a quorum is reached on the first vote. Richard O. Lempert, *Uncovering 'Nondiscernable' Differences: Empirical Research and the Jury Size Cases,* 73 MICH. L. REV. 643, 645 (1975); JON M. VAN DYKE, JURY SECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 193-214 (1977). Three states, Iowa, Minnesota and Nebraska, have adopted a procedure that allows a split verdict only after the jury has deliberated for six hours (a unanimous verdict can be rendered at any time).

Subdivision C.

This subdivision is drawn from Standard 15-1.3 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996) and extends the standard to civil cases.

The subdivision permits a stipulation to a non-unanimous verdict where the parties all agree to a specified number of concurring jurors and the court approves. Waivers of unanimous verdicts have traditionally been permitted in civil trials and have also been permitted in some state criminal trials. Wayne F. Foster, Annotation, *Validity and Efficacy of Accused's Waiver of Unanimous Verdict*, 97 A.L.R. 3d 1253 (1980); *see, e.g.*, *Ashton v. Commonwealth*, 405 S.W. 2d 562 (Ky. 1965); *State v. Ruppert*, 375 N.E. 2d 1250 (Ohio 1978). A stipulation regarding non-unanimity can be made at any time before verdict.

In criminal cases, stipulations cannot be approved unless the court has advised the defendant both of his or her right to a unanimous verdict and the consequences of waiver, and the defendant has personally waived that right in writing or in open court. The requirements to obtain a stipulation or a waiver of unanimity are necessarily stricter in criminal cases because of the heightened threat to individual liberty.

PRINCIPLE 5—IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

A. The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.

1. All procedures concerning jury selection and service should be governed by rules and regulations promulgated by the state's highest court or judicial council.

2. A unified jury system should be established wherever feasible in areas that have two or more courts conducting jury trials. This applies whether the courts are of the same or of differing subject matter or geographic jurisdiction.

3. Responsibility for administering the jury system should be vested in a single administrator or clerk acting under the supervision of a presiding judge of the court.

B. Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure:

1. The representativeness and inclusiveness of the jury source list;

2. The effectiveness of qualification and summoning procedures;

3. The responsiveness of individual citizens to jury duty summonses;

4. The efficient use of jurors; and

5. The reasonableness of accommodations being provided to jurors with disabilities.

Comment

This Principle places an affirmative obligation on courts to enforce and protect the rights of citizens to jury trials and jury participation. The Principle purposefully places this obligation on courts rather than the executive or legislative branches of government due to the direct impact that effective jury system management has on public perception of the fairness and integrity of the judicial branch of government. The pivotal role of the jury system in American democracy further warrants the direct responsibility

this Principle places on courts at all levels. *See generally* Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L. L. 79 (2003).

Subdivision A.

This subdivision is drawn from Standard 10 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

One of the most significant advances in court administration during the past several decades is the widespread acceptance of the principle that the judiciary should have the authority to control and reform the process by which the courts are administered and cases are litigated. Court rulemaking authority is inherently more flexible and responsive than the legislative process. This flexibility enables courts to react quickly in two critical ways: (1) to enact needed reforms, and (2) to take advantage of the latest technological innovations available to enhance jury system fairness and efficiency.

Obviously, the needs, resources and capabilities of large urban areas will differ from those in suburban or rural areas within the same state. In making rules pursuant to the authority suggested in this subdivision, states should take care to account for local needs, resources, customs and practices, and establish state standards flexible enough to permit them to be tailored to local needs and to encourage innovation at the individual administrator level. *See, e.g.,* Interim Report of the Commission on the Jury to the Chief Judge of the State of New York, *June 17, 2004 Press Release*, at 3, *available at* www.nycourts.gov/press.

This subdivision encourages efficient use of juror resources. Ample empirical evidence demonstrates that in most jurisdictions, far more jurors are called than are ever seated for jury service, resulting in inefficient use of juror resources. *See generally* G. Thomas Munsterman, *New York's 82 Percent Committee: What Would You Call Your Committee?* 18 COURT MANAGER 47 (2003). (citing statistics from various jurisdictions). Therefore, this subdivision advocates that the administration of jury systems within all the courts in a given locale be consolidated, standardized and directed from one central location. Standardized jury system administration improves overall

juror utilization, which has been proven to result in more positive juror experience with the system, increased taxpayer savings and more equitable allocation of jury service obligations among the population. *See* G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT, Elem. 7 (1996) (hereinafter MANAGEMENT).

Centralizing administration of jury systems for all local courts in one location necessitates management of that system by one designated jury manager, as does the use of a jury system management plan. *See generally Id.* at Elem. 1. Jurisdictions that do not consolidate administration of jury systems in one court should nonetheless designate a single, supervised jury manager at an appropriate level to ensure accountability and facilitate ongoing monitoring of the system as a whole.

Subdivision B.

This subdivision is drawn from Standard 12 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

This subdivision recognizes that regular data collection and analysis are essential to the effectiveness of the jury system. As of 2004, 32 states had examined or were currently examining their jury systems. *See, e.g.,* Interim Report of the Commission on the Jury to the Chief Judge of the State of New York, *June 2004, available at* 222.nycourts.gov/press; G. Thomas Munsterman, *Implementing Jury Trial Innovations*, Court Manager "Jury News," April 1, 2002, *available at* http://www.ncsonline.org. Those examinations have resulted in significant reforms to jury procedures in several states, including guaranteed one-day service, increased juror fees, telephone standby systems, parking and transit reimbursement and drafting of a juror's handbook. Jury System Improvement, April 5, 2005 *available at* www.courtinfo.ca.gov/jury/improvements.htm; National Center for State Courts, Jury Trial Innovations: State Links, May 5, 2005 *available at* www.ncsonline.org/WC/Publications/KIS_JurInnStatesPub.pdf. Regular data collection and analysis are essential to the success of these and future assessments of the effectiveness of the jury system. Data that identifies shortcomings in accommodating

jurors with disabilities is of particular importance because it enables courts to be more responsive to those shortcomings. For specific steps that courts can take to accommodate jurors with disabilities, *see* AMERICAN BAR ASSOCIATION, INTO THE JURY BOX: A DISABILITY ACCOMMODATION GUIDE FOR STATE COURTS (Fall 1994).

PRINCIPLE 6—COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;

2. Upon first appearance at the courthouse; and

3. Upon reporting to a courtroom for juror voir dire.

B. Orientation programs should be:

1. Designed to increase jurors' understanding of the judicial system and prepare them to serve competently as jurors;

2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and

3. Presented, at least in part, by a judge.

C. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury's role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they are under an obligation to refrain from talking about the case outside the jury room until the trial is over and the jury has reached a verdict. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.

4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.

Comment

This Principle is drawn from Standard 16 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

In order for citizens to fulfill their responsibilities as jurors, it is essential to inform prospective jurors what is expected of them and how they should approach the challenging tasks they will be performing in the course of jury service. Adequately apprising jurors of their role and responsibilities in the American legal system also promotes a positive attitude toward jury service among citizens by ensuring that they feel confident in performing their duties as jurors.

This Principle recognizes the many types of information received by jurors and emphasizes the importance of clear, concise communication with them.

Subdivisions A. and B.

For most citizens, jury duty is a unique experience. They are eager to do a good job, but are often unsure precisely what they will be asked to do. Jurors, particularly those who have never served before, may be unfamiliar with courts and court proceedings. Indeed, citizens are sometimes hesitant to appear for jury duty because they are uncertain about what to expect. Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses,* 82 JUDICATURE 156 (1999). Orientation of jurors should begin with the first contact between the court and the prospective juror. At the earliest possible time, either in the juror qualification questionnaire or in the jury summons, courts should inform prospective jurors about procedures for reporting, including where, when and how to report. The court should also let citizens know how to request a deferral or excuse. So that citizens can arrange their schedules to accommodate jury service, the court should also inform citizens how long jury service will last, whether for a set period of time or, as in many jurisdictions, for one day or, if they are selected, the length of a trial. Prospective jurors are sometimes reluctant to respond to a jury summons because they anticipate that jury duty will be likely to involve service on a long trial, like the

ones that receive attention in the media. It may also be useful to inform jurors that the vast majority of trials last less than a week.

With the growing use of the internet, a number of jurisdictions direct interested prospective jurors to a court website that provides much of this information, including maps showing how to find the courthouse. The website can also address questions frequently asked by jurors in the jurisdiction and handle requests for deferrals. Nancy S. Marder, *Jurors and Technology: Equipping Jurors for the Twenty-First Century,* 66 BROOK. L. REV. 1257 (2001). This technology offers an efficient and easy way for citizens to become acquainted with the courts and their responsibilities as prospective jurors. Although the internet is rapidly becoming a standard tool, courts using this technology should be sure to make the same information available to citizens who do not yet have easy access to, or facility with, the internet.

When jurors report for jury duty, they should receive an orientation that informs them about the trial process and their role in it, including how they were selected for jury duty, the responsibilities of jurors and court personnel and a general description of what will occur during the day. *See* G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT (1996). Videotaped presentations, supplemented by juror handbooks, can provide most of the orientation information that remains constant from day to day (e.g., proper juror conduct and behavior; a description of the typical courtroom layout; the functions of the judge and jury), but the introductory greeting welcoming the prospective jurors to the courthouse should include a personal greeting by a judge. Although it can be brief, the judge's personal greeting provides citizens with tangible recognition of the importance of jury service, whether or not the juror ultimately serves on a trial jury. *See Simants v. Nebraska,* 277 N.W.2d 219, 220 (Neb. 1979) (finding judge's brief personal communication with a juror proper).

Further orientation materials should be supplied to prospective jurors by the time they report to a courtroom for jury selection. The commentary appended to Standard 16 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993)

provides a detailed description of the matters that should be addressed when the jurors are initially contacted prior to service, when they first appear at the courthouse and when they report to a courtroom for jury selection.

Subdivision C.

Subdivision C. recognizes that courts have a responsibility to take measures that facilitate jurors' understanding of their responsibilities as jurors and the law they are to apply. Because jury instructions perform a crucial function in providing jurors with the legal framework that should guide their decision making, the instructions must be formulated and presented in a manner that is easy to understand. The unnecessary complexity of language, as well as the challenging and convoluted structure of many jury instructions, can create unnecessary obstacles to the effective use of instructions by the jury. Accordingly, instructions should be written in plain language and presented in a manner understandable to laypersons. The commentary regarding Principle 14 provides a full description of issues that should be addressed in formulating clear instructions.

The court should give preliminary jury instructions, both verbally and in writing, before the presentation of the parties' opening statements. These instructions should explain the jury's role and responsibilities, the basic general and specific underlying principles of law to be applied in the case and the order and nature of the presentations. COUNCIL FOR COURT EXCELLENCE DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEM IN WASHINGTON, D.C. (1998); B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Instruction Process*, 3 PSYCHOL. PUB. POL'Y. & LAW 589 (1997).

In the preliminary instructions, the court should tell jurors what they should and should not do in the course of the trial. The preliminary instructions should provide jurors with the instructions governing juror note-taking, submitting questions for

witnesses, the use of juror notebooks and the nature of the discussions concerning the evidence they are permitted to have among themselves during breaks in the trial, as described in Principle 13. The preliminary instructions should describe the circumstances under which such activities are permitted and each juror should receive a copy of those instructions to consult during the trial. The preliminary instructions should also advise jurors of their obligation to refrain from talking about the case outside the jury room until after the case is over. *See, e.g., United States v. Venske,* 296 F. 3d 1284 (11th Cir. 2002); *United States v. Brooks*, 161 F.3d 1240 (10th Cir. 1998).

The role of preliminary instructions is to provide an introduction to the parties and their claims, and to provide guidance on contested issues and the governing legal principles. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § V-9 (G. Thomas Munsterman et al., eds. 1997). Comprehension of jury instructions, including the ability to apply the law to the facts of the case and to recall relevant evidence, can be improved when jurors receive instruction on the applicable law both before and after the evidence, rather than simply after the evidence is presented. Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making,* 76 J. APPLIED PSYCHOL. 220 (1991); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or In Light of It?,* 1 LAW & HUM. BEHAV. 163 (1977). The value of preliminary instructions is consistent with the finding that people receive information more effectively if they understand in advance the context in which they will be required to evaluate or analyze that information, and repetition can enhance recall. Bradley Saxton, *How Well Do Jurors Understand Jury Instructions?,* 33 LAND & WATER L. REV. 59 (1998). Preliminary jury instructions should include sufficient detail on the legal framework the jurors will be asked to apply to inform the jurors about the relevant legal issues they should be aware of as the trial unfolds. For example, jurors may assume that their task in a tort case will simply be to decide whether or not the defendant is at fault. If the case involves a tort claim of comparative negligence, preliminary instructions should alert jurors to the possibility that at the end of the trial they will be asked to decide how much fault,

if any, should be assigned to each of the two parties. Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation,* 45 ARIZ. L. REV. 1, 66 (2003).

In delivering the preliminary instructions, the judge should explain that the instructions given at the beginning of the trial may be subject to some change in light of the evidence that emerges at trial, and that the jury will receive the final and definitive instructions only at the end of the trial after all of the evidence has been presented. The final instructions, discussed in Principle 14, should review the relevant content from the preliminary instructions as well as describe the procedures to be used in deliberations, the applicable law and the appropriate method for reporting the results of deliberations.

In the course of the trial, the court may provide the jury with additional explanations concerning the law that will assist the jury in understanding its role and responsibilities. Thus, in addition to ruling on objections, the judge may explain the purpose of a sidebar or the reason why the court is taking a recess to handle a trial-related matter.

All parties should submit proposed preliminary and final instructions in advance of the trial. These proposed instructions can help determine appropriate and timely presentation of procedural and substantive information to the jurors.

PRINCIPLE 7—COURTS SHOULD PROTECT JUROR PRIVACY INSOFAR AS CONSISTENT WITH THE REQUIREMENTS OF JUSTICE AND THE PUBLIC INTEREST

A. Juror interest in privacy must be balanced against party and public interest in court proceedings.

1. **Juror voir dire should be open and accessible for public view except as provided herein. Closing voir dire proceedings should only occur after a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury.**
2. **Requests to jurors for information should differentiate among information collected for the purpose of juror qualification, jury administration, and voir dire.**
3. **Judges should ensure that jurors' privacy is reasonably protected, and that questioning is consistent with the purpose of the voir dire process.**
4. **Courts should explain to jurors how the information they provide will be used, how long it will be retained, and who will have access to it.**
5. **Courts should consider juror privacy concerns when choosing the method of voir dire (open questioning in court, private questioning at the bench, or a jury questionnaire) to be used to inquire about sensitive matters.**
6. **Courts should inform jurors that they may provide answers to sensitive questions privately to the court, and the parties.**
7. **Jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.**
8. **Following jury selection and trial, the court should keep all jurors' home and business addresses and telephone numbers confidential and under seal unless good cause is shown to the court which would require disclosure. Original records, documents and transcripts relating to juror summoning and jury selection may be destroyed when the time for appeal has passed, or the appeal is complete, whichever is longer, provided that, in criminal proceedings,**

the court maintains for use by the parties and the public exact replicas (using any reliable process that ensures their integrity and preservation) of those items and devices for viewing them.

B. Without express court permission, surveillance of jurors and prospective jurors outside the courtroom by or on behalf of a party should be prohibited.

C. If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors' faces.

Comment

The jury is the cornerstone of democracy in the judicial branch of government. Unlike participation in most other institutions associated with democracy, however, jurors do not voluntarily choose to serve. Indeed, jurors are compelled to perform their duties or risk prosecution. As a part of their service jurors may be subjected to intrusive questioning and may be compelled to disclose highly personal information. This Principle recognizes that, in certain circumstances, jurors may have a legitimate interest in protecting their privacy and encourages courts to consider and, where possible, protect jurors' legitimate concerns regarding personal information. Such an approach is not only protective of jurors' interests but likely to foster juror participation and candor during jury selection.

Subdivision A.

This subdivision acknowledges that established law requires courts to balance the privacy interests of jurors and the rights of litigants and the public when determining whether to keep information touching on the private lives of jurors out of the public domain. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984). Subsections A.1 through A.8 are designed to establish a framework within which courts may balance those interests.

Subsection A.1 emphasizes the presumption that jury selection processes are generally open and accessible to public scrutiny as indicated in *Press-Enterprise Co.*, 464 U.S. at 501. Therefore, jurors' responses during jury selection are generally open to public view. David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 19-24 (1997). However, courts may close jury selection processes in those limited circumstances when the court determines that disclosure of the jurors' identities places them at risk of physical harm or where there is evidence of attempts to intimidate or influence the jury. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § III-8 (G. Thomas Munsterman et al. eds., 1997) [hereinafter INNOVATIONS].

Subsection A.2 recognizes that courts typically collect three types of information from jurors: qualification information; administrative information; and juror selection information. Qualification information is collected to determine whether a prospective juror meets the statutory requirements for service. Administrative information is gathered for purposes of efficient management by the jury system, and includes such items as address, telephone number and Social Security number. Jury selection information, on the other hand, is required by the court and counsel for purposes of examining the fairness and impartiality of prospective jurors in the context of a particular trial. Because qualification and administrative information is generally not necessary to satisfy litigant and public confidence in the fairness and impartiality of jurors, courts may reasonably place more restrictions on public and party access to such information. TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 80, 132-34 (1998). In fact, many states restrict public access to qualification and administrative information and/or require that such information be segregated from jury selection information. Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures,* 85 JUDICATURE 18, 21 (2001). Therefore, in addressing concerns of juror privacy courts should consider the extent to which policies regarding public access to each type of information should differ.

Subsection A.3 recognizes that ignoring the privacy concerns of jurors actually undermines the primary objective of voir dire examination by discouraging prospective jurors from disclosing personal and sensitive information in court. Hannaford, *supra,* at 19. This subsection encourages courts to consider the potential problem posed by allowing counsel to interrogate jurors extensively regarding personal information. Courts should take proactive measures to ensure that the personal information being solicited during voir dire is relevant to the selection of a fair and impartial jury. Courts should be extremely wary of identification-related questions, such as the name of children's schools or of employers, when such questions are not relevant to the instant matter. Moreover, courts have a duty to ensure that litigants are not eliciting information as a means of perpetuating unlawful bias. *Batson v. Kentucky*, 476 U.S. 127 (1986); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994). When potentially harmful or embarrassing, but relevant information is being elicited from jurors, courts should consider alternative methods of juror selection examination such as *in camera* examination or written questions. Courts can then, if warranted, take measures to redact such information before transcripts or questionnaires are released.

Juror confidence is enhanced when jurors are made aware of how the information about them will be used and of court procedure for handling the information jurors provide. Therefore, subsection A.4 urges that courts explain to jurors how the information they provide will be utilized. Because jurors are more likely to reveal sensitive information if they are told how such information is relevant, courts or attorneys should also explain the rationale of certain questions. *See* Hannaford, *supra,* at 23-24; Mary R. Rose, *Expectations of Privacy*, 85 JUDICATURE 10, 43 (2001). In addition, courts should inform jurors how the information that they provide will be retained.

Subsection A.5 requires courts to consider juror privacy concerns when choosing a method for voir dire examination. When examination involves very personal or potentially embarrassing or harmful information courts should consider the use of *in camera* examinations or a written questionnaire. *In camera* examinations relieve jurors from revealing personal information in open

court and in the presence of other jurors, court personnel, or spectators. INNOVATIONS, *supra, § III-4;* MURPHY ET AL., *supra,* at 80-81, 132-33. Questionnaires permit jurors to reveal sensitive or personal information in their written responses, rather than publicly. Such techniques serve to alleviate some of the discomfort that prospective jurors would otherwise feel. In choosing a method, courts should consider the likelihood of increased candor when jurors are permitted to explain their personal views in a private setting. Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 36 CT. REV. 10, 10-15 (1999). Moreover, before a determination to close a court proceeding or seal the record is made courts must balance the jurors' privacy interests against party and public interests and consider alternatives.

Subsection A.6 urges that courts should inform prospective jurors that once the nature of a sensitive question is made known to them, they may properly request an opportunity to present the answer to the court *in camera*, on the record, and in the presence of counsel. MURPHY ET AL., *supra,* at 132-33. This procedure serves to enhance juror confidence and foster candor because it informs the jurors that the court is aware of the challenge of providing sensitive information in a setting that the jurors have nearly no control over. Rose, *supra,* at 43.

Subsection A.7 directs that to ensure that jurors are not exposed to potentially prejudicial material regarding the trial, courts should examine the jurors as to such material out of the presence of one another. This procedure serves to preserve the integrity of the jury selection process.

The greatest variation in court practice exists in the area of record retention. Retention of juror information invites misuse of that information and wastes valuable court resources. Therefore, subsection A.8 proposes that courts should keep all jurors' home and business addresses and telephone numbers confidential and under seal. *See* MURPHY, ET AL., *supra,* at 133. Transcripts, documents and records relating to juror summoning and selection should be destroyed when the time for appeal has passed or the appeal is complete. *See* Hannaford, *supra,* at 44. However, exact replicas should be kept for criminal proceedings.

The access and replicas requirement of subsection A.8 are necessary in order to enable criminal defendants to enforce their right to be judged by an impartial jury. The ABA has specifically recognized that post-trial inquiries into juror bias can be critical to uncovering constitutional error. For this reason, defense counsel must "make every effort to develop the relevant facts, whether by interviewing jurors or otherwise." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.10.2 cmt. at note 260 (rev. ed. 2003) (citing sources). The conduct of such an investigation is "good cause" for the disclosure of juror information within the meaning of subsection A.8.

Subdivision B.

Subdivision B is drawn from Standard 7 of the ABA STANDARDS ON JURY USE AND MANAGEMENT (1993). This subdivision acknowledges that it is not uncommon for counsel to obtain the services of private investigators to conduct background investigations of prospective jurors. David Weinstein, *Protecting a Juror's Right To Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 33 (1997). Privacy issues are raised as private information is accumulated. The availability of information through the use of the internet increases the likelihood that the storage of information from unsupervised pre-trial investigations may result in an unintended harm. *Id.* at 6; *see also* Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation On The Internet—Implications For the Trial Lawyer,* 2 SEDONA CONF. J. 211, 211-12 (2001) (discussing the "powerful new investigatory tool" of the internet for attorneys and jury consultants). There is a concern that pre-trial investigations may threaten the impartiality of the jury if a juror discovers that his or her friends, family or neighbors have been subjected to surveillance. *See United States v. White,* 78 F. Supp. 2d 1025, 1026-28 (D.S.D. 1999). This subdivision urges the prohibition of surveillance of jurors or prospective jurors outside the courtroom, whether by a party or a party's agents, absent express court permission.

Subdivision C.

Subdivision C. recognizes that technology allows the media to provide information regarding a trial in real time. Roscoe C. Howard, Jr., *The Media, Attorneys, And Fair Criminal Trials,* 4 KAN. J.L. & PUB. POL'Y 61 (1995). Courts must be aware of the effects such coverage may have on a jury. For instance, the presence of cameras in a courtroom escalates the sensational aspects of the trial; therefore, the attention received may have an effect on the jurors' perception of their roles. Joseph F. Flynn, *Prejudicial Publicity In Criminal Trials: Bringing Sheppard v. Maxwell Into The Nineties,* 27 NEW ENG. L. REV. 857, 866 (1993). This subdivision acknowledges that the negative impact such attention may have on jurors is not merely speculative. Kenneth B. Nunn, *When Juries Meet The Press: Rethinking The Jury's Representative Function In Highly Publicized Cases,* 22 HASTINGS CONST. L.Q. 405, 430 (1995). Permitting the jury to be photographed or videotaped exposes them to the public, which in turn may subject them to being contacted and influenced by the community. *See Sheppard v. Maxwell,* 384 U.S. 333, 353 (1966); *see also Estes v. Texas*, 381 U.S. 532, 545-46 (1965). Such attention may cause the jurors to base their decision on the community's desires instead of the facts of the case. Nunn, *supra,* at 431. Therefore, to ensure the privacy of jurors and to prevent them from being exposed to outside influences, courts must take measures to insulate the jury from reporters and photographers. *See Sheppard,* 384 U.S. at 353; *Estes,* 381 U.S. at 545-46; *see also* MURPHY ET AL., *supra,* at 134.

PRINCIPLE 8—INDIVIDUALS SELECTED TO SERVE ON A JURY HAVE AN ONGOING INTEREST IN COMPLETING THEIR SERVICE

During trial and deliberations, a juror should be removed only for a compelling reason. The determination that a juror should be removed should be made by the court, on the record, after an appropriate hearing.

Comment

The significance of a jury is not limited to its role in the decision-making process; jury service also provides citizens with an opportunity to learn, observe and participate in the judicial process. In addition, jury service affords an opportunity for citizens to develop an active concern for and interest in the administration of justice. Jury duty is a civic responsibility shared by all qualified citizens. It is also a constitutional right of citizens recognized by the Supreme Court. *Powers v. Ohio,* 499 U.S. 400 (1991). Based upon the importance of jury service to jurors and parties, as well as to the interest of justice generally, once the process of selecting a jury has begun, the trial court has limited authority to discharge a sworn juror. *New York v. Wilson,* 484 N.Y.S.2d 733 (App. Div. 1985). "A defendant has a valued right to have his trial completed by a particular tribunal and removal of a juror is prejudicial to a defendant absent a showing of good cause." *Stokes v. State,* 532 A.2d 189, 190 (Md. 1987) (quoting *Tabbs v. State,* 403 A.2d 796, 798 (Md. 1979)).

A juror should not be removed absent a compelling reason. For example, if a juror becomes incapacitated during trial, he or she may be removed and replaced by an alternate juror if one is present. *See Wilson,* 484 N.Y.S.2d at 736. Incapacitated jurors are those who "become or are found to be unable or disqualified to perform their duties." ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY, 15-2.9 (1996). This Principle permits the court to replace a juror when it is discovered for the first time during trial that the juror should have been disqualified at the time that the juror was sworn, or when the incapacity develops during the course of the trial itself. *See* ABA STANDARDS FOR

CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY, 15-2.9 (1996); *see also United States v. Meinster*, 484 F. Supp. 442 (S.D. Fla. 1980) (juror suffered a heart attack during deliberations). However, only illness or other incapacity may be considered in an application to discharge a sworn juror. "The trial court 'cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left.'" *Wilson,* 484 N.Y.S.2d at 773.

In cases that involve possible jury nullification, courts should be extremely reluctant to remove a juror after he or she is sworn. In *United States v. Thomas,* 116 F.3d 606 (2d Cir. 1997), the court held that a juror who intends to nullify the applicable law is subject to dismissal on an analogy to a juror who disregards the court's instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict. *Id.* at 614. This case has been widely and appropriately criticized because a juror's intent to nullify has not, generally, been viewed as constituting compelling reason for removal and because of the overwhelming need to preserve the secrecy of the deliberative process. *See* Ran Sev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence,* 20 CARDOZO L. REV. 1275 (1999). Even the court in *Thomas* conceded that, once a jury has retired to deliberate, the trial judge's authority to dismiss a juror conflicts with the enormous importance of safeguarding the secrecy of jury deliberations. *See Thomas,* 116 F.3d at 618.

Other cases approving removal of sworn jurors involve only the most extraordinary and unusual circumstances. These include cases in which a juror is no longer capable of rendering an impartial verdict because he or she feels threatened by one of the parties, *United States v. Ruggiero,* 928 F.2d 1289, 1300 (2d Cir. 1991); when it is discovered that one of the jurors has a relationship with one of the parties, *United States v. Barone,* 846 F. Supp. 1016, 1018-19 (D. Mass. 1994); or when life circumstances otherwise change for a juror during the course of deliberations in such a way that the juror is no longer considered capable of rendering an impartial verdict. *United States v. Egbuniwe,* 969 F.2d

757, 762-63 (9th Cir. 1992) (affirming dismissal of juror who refused to deliberate or reach a guilty verdict because he had been threatened outside of court in relation to the deliberations). Nevertheless, such cases are exceedingly rare and require special proof of the cause for removal.

A compelling reason exists for removal if a juror refuses to deliberate. "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is he or she will not participate in discussion with fellow jurors by listening to their views and by expressing his or her own view." *People v. Cleveland*, 21 P.3d 1225, 1237 (Cal. 2001). Dismissal for this reason has been limited to extreme circumstances as when a juror "express[es] a fixed conclusion at the beginning of deliberations and refus[es] to consider other points of view, refus[es] to speak to other jurors, and attempt[s] to separate [him]self physically from the remainder of the jury." *Id.* at 1237-38. A juror who does not deliberate well or relies on faulty logic or analysis does not demonstrate a refusal to deliberate. *Id.*

Assembling A Jury

PRINCIPLE 9—COURTS SHOULD CONDUCT JURY TRIALS IN THE VENUE REQUIRED BY APPLICABLE LAW OR THE INTERESTS OF JUSTICE

A. In civil cases where a jury demand has been made, a change of venue may be granted as required by applicable law or in the interest of justice.

B. In criminal cases, a change of venue or continuance should be granted whenever there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. A showing of actual prejudice should not be required.

C. Courts should consider the option of trying the case in the original venue but selecting the jury from a new venue. In addition to all other considerations relevant to the selection of the new venue, consideration should be given to whether the original venue would be a better location to conduct the trial due to facilities, security, and the convenience of the victims, court staff, and parties. This should be balanced against the possible inconvenience to the jurors.

Comment

Principle 9 recognizes that courts deciding motions for changes of venue do so by applying a large body of U.S. constitutional and state law. Principle 9 is intended to supplement, not replace, that body of law.

The Principle's requirement that courts should conduct jury trials in the venue required by applicable law while remaining cognizant of the interests of justice is undergirded by extensive social science research regarding the influence of pre-trial publicity on potential jurors and trial outcomes and the effectiveness of measures short of change of venue to ensure trial fairness. *See generally* Edith Greene & Elizabeth F. Loftus, *What's New in the News? The Influence of Well-Publicized News Events on Psychological Research and Courtroom Trials*, 5 BASIC & APPLIED SOC.

PSYCHOL. 211 (1984) (analyzing the impact of an unrelated news story regarding mistaken identification on trial involving eyewitness testimony); Edith Greene & R. Wade, *Of Private Talk and Public Print: General Pre-Trial Publicity and Juror Decision-Making*, 2 APPLIED COGNITIVE PSYCHOL. 123 (1988) (analyzing the impact of general pre-trial publicity involving similar events on trial outcomes).

Subdivision A.

Subdivision A. indicates that a change of venue may be appropriate in a civil case either under applicable law or in the interest of justice. Examples of problems warranting a change of venue in civil actions have become increasingly common.

Pre-trial publicity may create difficulties in civil trials involving celebrities or issues directly related to high-profile criminal cases. In addition, civil trials may present other occasions warranting a change of venue, such as in suits involving a highly publicized event, or a matter which significantly impacts a particular community.

Subdivision B.

Subdivision B. is drawn from Standard 15-1.4 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision recognizes that criminal trials should ordinarily be held in the place where the offense occurred. As a general matter, holding criminal trials in the community where the crime occurred is equally favorable to both the prosecution and the defense. Costs are reduced, witnesses are readily available for both sides, jurors are familiar with the geographic area, the jury is representative of the community and citizens are afforded the opportunity to participate directly in their government. There are numerous examples of recent cases which have been subject to widespread pre-trial publicity that have been filed, denied change of venue and successfully tried or disposed of in their home jurisdictions. *See* TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR

STATE COURTS, MANAGING NOTORIOUS TRIALS 1 (1998) (citing examples such as the cases involving Lorena Bobbitt, O.J. Simpson, Louise Woodward and the 1993 World Trade Center bombing). Some scholars have gone so far as to argue that the community's right of "vicinage" is a matter of constitutional imperative. *See, e.g.*, Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000).

At the same time, the factors that normally support trial of a criminal case in the local jurisdiction can, in some circumstances, produce bias necessitating change of venue to ensure a fair trial.

One of these circumstances is when the impact of the alleged crime is so pervasive in a community as to taint the entire pool of available jurors, as in the Oklahoma City bombing. In such cases, changes of venue are granted because the impact of the crime in the community results not only in extensive pre-trial publicity, but also in a substantial likelihood that the members of the jury pool know or are related to one or more of the many victims. *See* MURPHY, ET AL., *supra,* at 20.

Another such circumstance is when jurors become aware that the verdict reached may result in violence within the community, and that potential for violence rises to the level of influencing trial outcome. *See generally* MURPHY ET AL., *supra,* at 21; *see also, e.g., Lozano v. Florida,* 584 So.2d 19 (Fla. Ct. App. 1991) (manslaughter conviction of Miami police officer overturned on appeal following denial of change of venue motion where evidence showed substantial likelihood of violence if there were an acquittal); *Michigan v. Budzyn,* 566 N.W.2d 229 (Mich. 1997) (overturning conviction of Detroit police officer where juries became aware of city riot planning in the event of acquittal).

Subdivision C.

Subdivision C. encourages the consideration of "change of venire" or out-of-locality juries. Using this method, the jury is selected from outside the jurisdiction and brought to the original jurisdiction, where the trial is conducted. *See* MURPHY ET AL., *supra,* at 21-22; *see also* Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do To Ensure*

a Fair Trial in the Face of a "Media Circus," 26 SUFFOLK U. L. REV. 1063, 1086-87 (1992). Changes of venire are frequently treated along with changes of venue in applicable state laws and court rules and require courts to apply similar standards for granting either motion.

The "change in venire" option has enjoyed more widespread use in recent years as a preferred alternative to complete change of venue, with its associated costs and impact on the receiving jurisdiction. As out-of-town jurors may be de facto sequestered if their home locale is at a great distance from the trial, courts using this procedure should be mindful of its potential impact on jurors and the deliberative process.

PRINCIPLE 10—COURTS SHOULD USE OPEN, FAIR AND FLEXIBLE PROCEDURES TO SELECT A REPRESENTATIVE POOL OF PROSPECTIVE JURORS

A. Juror source pools should be assembled so as to assure representativeness and inclusiveness.

1. The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.

2. The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population.

3. The court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.

4. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.

5. Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet eligibility requirements.

B. Courts should use random selection procedures throughout the juror selection process.

1. Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection, except when a court orders an adjustment for underrepresented populations.

2. Courts should use random selection procedures in:

a. Selecting persons to be summoned for jury service;

b. Assigning jurors to panels;

c. Calling jurors for voir dire; and

d. Designating, at the outset of jury deliberations, those

jurors who will serve as "regular" and as "alternate" jurors.

3. Departures from the principle of random selection are appropriate:

a. To exclude persons ineligible for service in accordance with basic eligibility requirements;

b. To excuse or defer jurors in accordance with C. below;

c. To remove jurors for cause or if challenged peremptorily in accordance with D. and E. below; or

d. To provide jurors who have not been considered for selection with an opportunity to be considered before other jurors are considered for a second time, as provided for in Standard 2 D. 3.

C. Exemptions, excuses, and deferrals should be sparingly used.

1. All automatic excuses or exemptions from jury service should be eliminated.

2. Eligible persons who are summoned may be excused from jury service only if:

a. Their ability to perceive and evaluate information is so impaired that even with reasonable accommodations having been provided, they are unable to perform their duties as jurors and they are excused for this reason by a judge; or

b. Their service would be an undue hardship or they have served on a jury during the two years preceding their summons and they are excused by a judge or duly authorized court official.

3. Deferrals of jury service to a date certain within six months should be permitted by a judge or duly authorized court official. Prospective jurors seeking to postpone their jury service to a specific date should be permitted to submit a request by telephone, mail, in person or electronically. Deferrals should be preferred to excusals whenever possible.

4. Requests for excuses or deferrals and their disposition should be written or otherwise made of record. Specific uniform guidelines for determining such requests should be adopted by the court.

D. Courts should use sensible and practical notification and summons procedures in assembling jurors.

1. The notice summoning a person to jury service should be easy to understand and answer, should specify the steps required for answering and the consequences of failing to answer, should allow for speedy and accurate eligibility screening, and should request basic background information.

2. Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.

E. Opportunity to challenge the assembled jury pool should be afforded all parties on the ground that there has been material departure from the requirements of the law governing selection of jurors. The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors.

Comment

This Principle is derived primarily from the ABA's STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and the STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996). It sets forth a variety of well-tested procedures to help courts gather pools of prospective jurors that properly represent the characteristics of the community at large.

The selection of a jury from "a fair cross section of the community is fundamental to the American system of justice." *Taylor v. Louisiana,* 419 U.S. 522, 530 (1975) (footnote omitted). As the Supreme Court has observed:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503-04 (1972); *see also People v. Wheeler,* 583 P.2d 748 (Cal. 1978); Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy,* 78 CHI.-KENT L. REV. 1033 (2003).

The representativeness of the jury is initially dependent on the quality of the source data used for summoning. The closeness of this relationship was succinctly stated by the Supreme Court of California in *People v. Wheeler.* "Obviously if that [source] list is not representative of a cross-section of the community, the process is constitutionally defective *ab initio.*" *Wheeler*, 583 P.2d at 759.

Subdivision A.

This subdivision advises that jury source pools should be representative and inclusive of the eligible population in the jurisdiction. Representativeness is achieved when the percentages of cognizable group members on the source lists are reasonably proportionate to their corresponding percentages in the population. Representativeness and inclusiveness are conceptually distinct and may be antagonistic in practice. Inclusiveness pertains to the percentage of the entire eligible population in a jurisdiction that is included in the sources. Sources can be representative, yet not inclusive. There can be absolute certainty that sources are both representative and inclusive only when they contain 100 percent of the eligible population.

The pursuit of inclusiveness, however, is more straightforward and avoids the need to define the many dimensions of representativeness. By striving for inclusiveness we generally advance representativeness.

Inclusiveness is also important in order to distribute the experience and educational value of jury service across the greatest proportion of the population. The benefit of jury service was remarked by Tocqueville in the 19th century: "The jury serves amazingly to form the judgment and increase the natural enlightenment of the people. That, in my opinion, is its greatest advantage. It must be considered as a school that is free and always open." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Vol. 1, Ch. 8 (trans. Stephen D. Grant 2000). This benefit is maximized

when all citizens serve. The burden of service in terms of time, expense and lost income is minimized when all persons share the experience of jury duty.

Subsection A.1 advises that names of potential jurors should be drawn from two or more regularly maintained lists. Arguments against the use of multiple lists have pointed to the difficulty and cost of combining lists and the difficulty of ensuring that individuals are not entered on the combined list more than once. However, techniques have been developed to accomplish these tasks at relatively little cost. These techniques have been tested in the juror source list context and been found to be effective. *See* PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, THE PROMISE AND CHALLENGES OF JURY SYSTEM TECHNOLOGY Ch. 2 (2003).

Many other lists, if they are reasonably current, can be used as a supplement to the original single source (often the roll of registered voters). The most common second list is the list of persons holding drivers licenses or identification cards issued by the state licensing authority. As of 2004, over half of the states use the list of registered voters and the drivers list. Some combine additional sources such as the welfare, unemployment or state income tax lists. Only a few states use the voter or drivers list alone. In selecting lists to be used to form a jury source list, policy makers should consider the frequency with which names are added to and deleted from those lists and when corrections are made for addresses and other information.

Subsection A.2 recognizes representativeness as the proportionate representation of cognizable groups on the source list and in the assembled jury pool.

The Supreme Court in *Duren v. Missouri,* 439 U.S. 357 (1979), has defined the steps necessary to establish that proportionality is lacking. The three requirements to challenge representativeness are: (1) "that the group alleged to be excluded is a 'distinctive' group in the community"; (2) "that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community"; and (3) "that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Id.* at 364.

The first prong requires that the alleged group is distinctive or cognizable. A group meets this requirement if members of the group view themselves as distinct, others view the group as distinct and they hold values not necessarily represented by other groups. The second prong requires the application of various statistical tests to show that the underrepresentation is significant. The third prong requires the party challenging the representativeness show that the underrepresentativeness is due to a function of the system and not simply a random occurrence. *See* Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Voir Dires,* 43 JUDGES J. No. 4 at 17 (2004).

Subsections A.3 and A.4 recommend that courts conduct periodic examination of the source lists being used by a jurisdiction for summoning prospective jurors in order to ensure that the lists are both representative and inclusive of the eligible population in that jurisdiction. If the lists are found deficient in any way, the court should correct the deficiency. *See* G. Thomas Munsterman & Paula L. Hannaford-Agor, *Building on Bedrock, The Continued Evolution of Jury Reform,* 43 JUDGES J. No. 4 at 11-16 (2004).

Subsection A.5 calls upon jury officials to determine the specified qualifications of prospective jurors. This may be accomplished by questionnaire or interview in order to disqualify those who fail to meet eligibility requirements. Such advance screening saves time in the later selection of jurors in individual cases. The discretion afforded jury officials is limited, however, to the determination of whether the prospective juror satisfies qualifications defined by law.

Subdivision B.

Subdivision B. calls for random selection procedures at all appropriate stages of the juror selection process to ensure that the representativeness provided by broadly based jury source lists is not inadvertently diminished or consciously altered.

Subsection B.1 recognizes that random selection of juries can be achieved by various means. Methods can range from manually reaching into a box for the ballots or cards containing the names

of prospective jurors to the use of automated systems. This subsection provides a definition of randomness: giving each "eligible" and "available" person an "equal probability of selection."

The last phrase of subsection B.1 makes an exception to random selection "when a court orders an adjustment for underrepresented populations." Such adjustments should be made only after careful consideration of the methods to be used. An adjustment for an underrepresented population can impact the representation of other populations. *See* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation,* 52 VAND. L. REV. 353 (1999); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design,* 79 JUDICATURE 273 (1996); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection,* 68 N.Y.U. L. REV. 707 (1993). The use of race/ethnicity is particularly problematic because of additional concerns about the constitutionality of methods under Equal Protection jurisprudence. *See* Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection,* 32 U. MICH. J.L. REF. 323 (1999).

Subsection B.2 advises that random selection procedures are particularly appropriate at four points in the jury selection process: the selection of names of the persons to be summoned for jury service; assignment of those persons to panels; calling persons for consideration in the voir dire process; and designating those jurors who will serve as "regular" and as "alternate" jurors. Randomization procedures may be repeated at each of these stages, although this is not required. For example, the individuals who have been randomly selected to be summoned could be assigned to panels in the order in which their names are drawn from the source list.

Subsection B.3 lists four instances in which exceptions to random selection procedures are appropriate. The first three involve instances when an individual's eligibility, availability for service or impartiality in a particular case is at issue. Clearly, a rational, nonrandom decision must be made in each of these situations to ensure the integrity, quality and efficient operation of the jury

system. The fourth instance, B.3d., addresses a possible side effect of a completely random selection. Unless there is an opportunity for all persons on a list to be selected before a name can be drawn a second time, some individuals will be called upon to serve several times while others will not be called at all. To overcome this problem, a "randomization or sampling without replacement" system can be used. Under such a system, the entire list of persons on standby or available is exhausted before a name is drawn a second time. Similarly, every person in the juror pool would be sent to a courtroom for voir dire before an individual returned to the pool after jury selection can be sent a second time. This procedure should ensure that all cognizable groups are represented in the pools and panels from which juries are selected, in a fair and reasonable relationship to the number of such persons in the community and that as many citizens as possible serve on juries.

Subdivision C.

Subdivision C. advises that exemptions, excuses and deferrals should be pared to a minimum. The Supreme Court has held that a jury drawn from a representative cross section of a community is an essential component of the Sixth Amendment guarantee of trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522 (1975). The exclusion of a substantial portion of the community from jury service through excuses or exemptions seriously alters the representativeness and inclusiveness of a jury panel. *See* G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT, Elem. 6 (1996). Representative juries will be attained only if the source lists are representative and if as many people as possible on those lists actually appear on jury panels. This subdivision counsels that there must be strict limitation on the number of individuals released from jury duty through excuses and exemptions if the goals of representativeness and inclusiveness are to be achieved.

Subsection C.1 advises that all automatic excuses or exemptions should be eliminated as has been done in 29 states and the District of Columbia. A few states exempt individuals who fall

into certain occupational categories or, upon request, automatically excuse other classes of individuals, such as the elderly or mothers caring for young children. In many areas, this practice has resulted in the absence of a significant portion of the community from the pool of prospective jurors. The difficulty of securing a representative cross section of the community is further increased where certain persons, such as physicians, attorneys, government service workers, accountants and clergymen are exempted from jury service.

The report of the New York Jury Project stated that "5 to 10% of New Yorkers who return their qualification questionnaires claim an occupational exemption. These exemptions were thereafter eliminated increasing the number of available persons such that the percent of persons reporting who indicated that this was their first time on jury duty increased from 33% to over 50%." *See* OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE, NEW YORK UNITED COURT SYSTEM, JURY REFORM IN NEW YORK STATE: A SECOND PROGRESS REPORT ON A CONTINUING INITIATIVE, 33 (March 1998).

This subdivision urges adoption of a strict excuse policy in order to reduce the erosion of representativeness and inclusiveness of the jury at the excuse stage of the jury selection process. Consequently, subsection C.2 recommends that individuals be excused in only a small number of instances. The grounds for excuse are phrased in functional terms rather than as broad diagnostic labels, since it is the effect of the disability rather than its cause which is significant. Accordingly, subsection C.2a. envisions that an excuse only be granted when an individual is so physically or mentally impaired that he or she is unable to receive and assess the evidence and arguments and participate in deliberations with the jury members.

The court may release an individual from jury duty under subsection C.2a. on its own motion. To require a mentally disabled individual to request an excuse makes little sense. Because of the discretion and sensitivity required and to prevent abuse, a judge rather than an administrator should decide whether to grant or deny an excuse on this basis. A judge may also take advanced age

into consideration if any individual requests to be excused. However, age should not constitute an automatic excuse. Rather, age-related problems and disabilities should be considered in an individualized determination.

Subsection C.2b. advises that an excuse may be granted when an individual demonstrates that he or she served as a member of a venire within the past twenty-four months, or that jury service would cause exceptional personal hardship, economic or otherwise, to the individual requesting the excuse, to members of his or her family, to others dependent on his or her skills or services or to members of the public whom that individual serves. The prior service provision spreads jury service more equitably over the population of eligible persons. The hardship provision gives courts the necessary flexibility to accommodate exceptional cases.

Subsection C.3 recommends that all requests for an excuse that do not meet the criteria for excusing a juror should be accommodated by deferring an individual's jury service. In such circumstances, jury service should be rescheduled immediately for a specific date when the individual will be able to serve. Permitting jury service to be deferred and rescheduled increases the overall representativeness and inclusiveness of the jury pool while decreasing the hardship of jury service.

To facilitate the attainment of these goals, procedures for obtaining a deferment should be relatively simple and informal. This includes allowing prospective jurors seeking to postpone their jury service to a specific date to do so by submitting a request by telephone, mail, in person or electronically. Care must be taken, however, to ensure that the Principle's purpose of increasing representativeness and inclusiveness is not defeated through abuse of the deferment policy. This can be done by limiting the number deferred to a specific date and the number of deferrals allowed to each person.

Subsection C.4 advises that in order to avert charges of arbitrary or capricious action, a request for an excuse or deferral should be made in writing or, if made orally, reduced to writing for the court's records. Such records are essential for operating a fair and efficient deferral program and for monitoring the effect of the excuse and deferral process. Requests should be considered

on a case-by-case basis by a judge or duly authorized court official to ensure that sufficient justification for an excuse exists. Recognizing the need for consistency, the subsection further suggests the creation and adoption of a specific and uniform written policy detailing what constitutes undue hardship, specifying the manner in which the hardship is to be demonstrated, and imposing limitations on the number of deferments allowed per individual. The uniform application of a strict, written policy will preclude the granting of arbitrary and inequitable excuses from jury service. Moreover, safeguards against the granting of excessive excuses will protect the representative character of the jury pool.

Subdivision D.

Subdivision D. urges adoption of clear policies and procedures to ensure, to the greatest extent possible, that a summons for jury service involves the use of sensible and practical notification and summons procedures for assembling jurors.

Subsection D.1 sets forth the requirements for a summons. The design and packaging of the notification form is important not only for reasons of efficiency but also because the form serves as an introduction to the courts. Long, legalistic documents may be confusing, tedious, and aggravating to prospective jurors. Both the operation of the jury system and esteem for the judicial process is significantly enhanced when citizens called for jury duty understand what is expected of them, and why it is required. Since the summons will be the first contact for many individuals with the court system, it is essential that the form be as clear and concise as possible.

First, the summons should specify both the manner in which the prospective juror is to respond—by appearing at the courthouse or by calling a particular telephone number—and the exact time, date and place by which the response must occur. Special features, such as a juror-parking pass or a map illustrating how to reach the courthouse can promote a positive citizen response and attitude. Many courts provide this information on a juror-specific internet site. In addition, subsection D.1 advises that the summons should provide notice that compliance is required by law.

Respect for the law should be encouraged. The recipient of a summons should not be able to assume that it can be ignored with impunity. Subsection D.2 carries this concept further by urging that courts establish procedures for dealing with non-respondents appropriately and that the enforcement process should be monitored. *See* Robert G. Boatright, *Improving Citizen Response to Jury Summonses*, American Judicature Society, 1988.

The results of such efforts have been significantly improved response rates. *See* Colin F. Campbell & Bob James, *Innovations in Jury Management from a Trial Court's Perspective*, 43 JUDGES J. No. 4 at 24 (2004); see also OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE, *supra*, at 33.

Further, subsection D.1 advises that the summons sent to prospective jurors be carefully tailored to meet the screening and information needs of the jurisdiction. Many different formats for qualification questionnaires are used. Some are designed for manual screening, others for manual entry into a computer, and still others for reading by an optical scanner. Whatever method is used, the form should facilitate rather than complicate the screening process. *See* PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, *supra*.

Subdivision E.

This subdivision is drawn from Standard 15-2.3 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Subdivision E. advocates that all parties be given an opportunity to challenge the jury array. This is a pretrial procedural mechanism by which any party may attack the validity of the process by which the venire is summoned. WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 968, 969 (4th ed.) (2004). The challenge aims at the panel as a whole and not at any single juror. The challenge is addressed to the court, and if the challenging party establishes the grounds, the panel must be discharged.

The challenge to the array is governed by statute in most jurisdictions. Although the statutes vary, most address the timing of the challenge and the grounds on which the challenge is to be

determined. Failure to comply with the time limits in the applicable statute or rule is generally considered to be a waiver of the challenge to the array, at least in a case involving a challenge based on the statutory selection process.

The burden of proof is upon the party challenging the array. When the challenge is on statutory grounds, the party objecting must establish a statutory violation. *See State v. Pelican,* 580 A.2d 942 (Vt. 1990). When the challenge is on constitutional grounds, the party objecting must establish that the jury selected was not a constitutionally requisite cross-section as discussed in A.2 above.

To facilitate the monitoring of representativeness, the court should maintain demographic information regarding potential jurors on source lists, on summonses issued and actually reporting for service. Some courts may be fearful of maintaining such data because it can foster a challenge as previously described. However, if the court is to comply with the periodic review requirement of A.3 and the corrective action requirement of A.4, then such information is essential.

Some source lists contain demographic information. Indicia of representativeness can be inferred by comparing source list coverage to some sub-jurisdiction measure such as census tract or zip code or similar U.S. Census information. Some courts, including all federal district courts, ask responding citizens to provide demographic information. Comparison to U.S. Census information is again possible. Persons reporting for jury service can be asked to supply demographic information; however, means to respect jurors' privacy should be provided as specified in Standard 7A.8. *See Duren v. Missouri*, 439 U.S. 357 (1979); *see also United States v. Ross*, 468 F.2d 1213 (9th Cir. 1972); *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983).

PRINCIPLE 11—COURTS SHOULD ENSURE THAT THE PROCESS USED TO EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR AND IMPARTIAL JURY

A. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.

1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.

3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

B. The voir dire process should be held on the record and appropriate demographic data collected.

1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors' legal qualification to serve in the case.

2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit

each separately represented party to participate meaningfully in questioning prospective jurors, subject to reasonable time limits and avoidance of repetition.

3. Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.
4. Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.
5. It is the responsibility of the court to prevent abuse of the juror selection examination process.

C. Challenges for cause should be available at the request of a party or at the court's own initiative.
   1. Each jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.
   2. At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.
   3. In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

D. Peremptory challenges should be available to each of the parties.
   1. In the courts of each state, the number of and procedure for exercising peremptory challenges should be uniform.

2. **The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.**
3. **The court should have the authority to allow additional peremptory challenges when justified.**
4. **Following completion of the examination of jurors, the parties should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.**

E. Fair procedures should be utilized in the exercise of challenges.

1. **All challenges, whether for cause or peremptory, should be exercised so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge.**
2. **After completion of the examination of jurors and the hearing and determination of all challenges for cause, the parties should be permitted to exercise their peremptory challenges as set forth in D. 4. above. A party should be permitted to exercise a peremptory challenge against a member of the panel who has been passed for cause.**
3. **The court should not require a party to exercise any challenges until the attorney for that party has had sufficient time to consult with the client, and in cases with multiple parties on a side, with co-parties, regarding the exercise of challenges.**
4. **No juror should be sworn to try the case until all challenges have been exercised or waived, at which point all jurors should be sworn as a group.**

F. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.

1. **It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.**

2. **A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that the party challenged the juror because of the juror's membership in that group.**
3. **When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.**
4. **The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.**
5. **When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above.**

G. **The court may empanel a sufficient number of jurors to allow for one or more alternates whenever, in the court's discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.**

1. **Alternate jurors shall be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as regular jurors.**
2. **The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation.**
3. **In civil cases where there are 12 or fewer jurors, all jurors, including alternates, should deliberate and vote, but in no case should more than 12 jurors deliberate and vote.**

H. Courts should limit the use of anonymous juries to compelling circumstances, such as when the safety of the jurors is an issue or when there is a finding by the court that efforts are being made to intimidate or influence the jury's decision.

Comment

Principle 11 encourages courts to establish and enforce practices that promote the selection of a jury that is fair and impartial. Principle 11 provides judges and counsel with model procedures that promote the intelligent and lawful exercise of for-cause and peremptory strikes of unfit prospective jurors. This Principle addresses the policy issues of how voir dire can elicit necessary and useful information while still observing constitutional requirements and respecting the privacy interests of prospective jurors.

Subdivision A.

This subdivision encourages the use of pre-voir dire questionnaires. It is drawn from Standard 15-2.2 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

It is beneficial both to the system as a whole and to the attorneys involved in a particular case to use a questionnaire to obtain information from prospective jurors. The questionnaire data should be furnished to counsel before voir dire along with the list of prospective jurors. Use of a questionnaire is likely to shorten the time necessary for juror selection and permits both the court and counsel to make better informed decisions about the exercise of challenges during the jury selection process.

This subdivision discusses two types of questionnaires: a basic questionnaire to be returned by the prospective jurors in all cases and a specialized questionnaire to be returned by prospective jurors when the demands of a particular case warrant it.

The purpose of questionnaires is to shorten the time required for the voir dire, and thereby streamline the trial process. Questionnaires should be mailed to all prospective jurors well in advance of trial, to be returned either by mail before the day of trial or when the jurors arrive at the courthouse. MANUAL FOR COMPLEX LITIGATION (THIRD) § VI(A)(3)(e) (1995). In any case, they should be returned in sufficient time to permit timely use by the court and counsel.

Basic questionnaires currently in use vary significantly as to length and intrusiveness of the questions proposed. The basic questionnaire should enable counsel to acquire sufficient information without engaging in overly intrusive questioning. The Federal Judicial Center has recommended an extensive, yet not overly intrusive questionnaire. *Id.* Specialized questionnaires are designed to obtain information more directly related to the issues in a particular case. They should be designed to permit the court and counsel to gain specialized information needed for effective voir dire in an efficient manner.

There are several benefits to providing questionnaires to counsel before voir dire. First, repetitive voir dire questioning can be minimized. Second, prospective jurors may be more willing to divulge sensitive information on the written form than to discuss the same information in open court. Mary R. Rose, *Juror's Views of Voir Dire Questions,* 85 JUDICATURE 10, 14 (2001); Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 20 (2001). Third, the questionnaires, by providing relevant information early, permit the court and counsel to conduct a more focused voir dire. Valerie Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process,* 78 CHI-KENT L. REV. 1179, 1198 (2003). Lastly, questionnaires can reduce the number of citizens who spend time waiting to be questioned for a case on which

they could never serve. In such instances, the parties can stipulate that some questionnaire responders can be sent to another courtroom. *See*, AMERICAN SOCIETY OF TRIAL CONSULTANTS, POSITION STATEMENT OF THE AMERICAN SOCIETY OF TRIAL CONSULTANTS REGARDING EFFORTS TO REDUCE OR ELIMINATE PEREMPTORY CHALLENGES (2004).

To encourage honesty and to enhance the value of the use of the questionnaire, prospective jurors should be advised of the purpose of the questionnaire, how their answers will be used and who will have access to the information.

Subdivision B.

This subdivision is drawn from Standard 7 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993). It addresses the gathering of information through voir dire.

The voir dire process provides the court and the parties with the opportunity to question prospective jurors to discover conscious or subconscious preconceptions and biases or other facts related to selecting a fair and impartial jury. Voir dire is a valued and integral part of the adversary process and is necessary for the intelligent and effective exercise of challenges. *Swain v. Alabama*, 380 U.S. 202, 218-219 (1965).

Since the right of a criminal defendant to an impartial jury of peers makes voir dire a fundamental part of the trial process, the voir dire examination and the exercise of challenges should be recorded in a manner that will permit the subsequent rendering of a verbatim transcript should one be requested during an appeal challenging the jury selection process or the competency of counsel. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, UNIFORM R. CRIM. P. 754(a) (1987). The jury selection process in civil cases is no less critical. Hence making voir dire procedures a matter of record in civil cases as well as in criminal cases is recommended.

Challenges for cause and peremptory challenges are intended to be used, within certain restrictions, by counsel on the basis of judgments about prospective jurors' possible attitudes toward the

case or one of the parties. Counsel are entitled to a reasonable amount of information on which to base such judgments.

The jury selection portion of a trial can exhibit differing professional interests of lawyers and judges. Counsel argue that they are most familiar with their cases and must zealously obtain information on behalf of their clients. Moreover, voir dire is the only chance to gain insights about prospective jurors. Hence, counsel seek opportunity for robust questioning. *See, e.g.*, Abbe Smith, *Nice "Work If You Can Get It": Ethical Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523 (1998); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 558-59 (1975).

Conversely, courts faced with burgeoning caseloads, often feel the need to take over the questioning of prospective jurors. Unlimited voir dire examination may be unduly time-consuming, hamper the efficient use of jurors and probe unnecessarily into the private lives of prospective jurors. G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, JURY SYSTEM MANAGEMENT (1996); William H. Levit et al., *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 942-44 (1971).

The subdivision recognizes the need to balance the contending objectives of eliciting sufficient information during voir dire for the effective use of challenges while restricting unnecessary inquiry into matters beyond the proper scope of voir dire to protect juror privacy and to expedite the process. It reflects the conclusion that voir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the impaneling of an unbiased jury than is voir dire conducted by the judge alone. A simple, perfunctory examination by a judge does not "reveal preconceptions or unconscious bias." *Dingle v. State*, 759 A.2d 819, 828-29 (Md. 2000); *see also Darbin v. Nourse*, 664 F.2d 1109, 1115 (9th Cir. 1981); *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984).

Because this subdivision also recognizes the potential for abuse of the voir dire process by attorneys, the subdivision provides for judicial control of the process. Appropriate judicial oversight should be sufficient to curb voir dire excesses and to ensure that

the process is not overly lengthy. Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 427-433 (1985). In addressing the potential tension between counsel's need to obtain sufficient information through questioning of potential jurors and the judge's obligation to ensure that the process is not abused and unduly protracted, this subdivision contains no specific time limitations; neither is there a proposed limitation on the potential subject matter of inquiry.

This subdivision sets out the principles that should guide the trial judge in exercising this discretionary oversight. Subsections 1 and 2 suggest that the initial questioning of citizens should be done by the court followed by reasonable inquiry from the parties. Studies have shown that focused examination of the venire members by the court and counsel in a more private setting than an open courtroom can yield invaluable information regarding disqualifying conditions. Gregory E. Mize, *Be Cautious of the Quiet Ones,* available at http://www.abota.org/publications/article.asp?newsid=94 (2003); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room,* 33 CT. REV. 1 (Spring 1999); Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine,* 69 S. CAL. L. REV. 1105, 1118-20 (1996). Accordingly, subsection 2 encourages questioning of prospective jurors both as a panel and individually.

Subsection 3 provides that the voir dire should be at least sufficient for counsel to uncover any bases for challenges for cause and to permit counsel to obtain enough information to facilitate intelligent exercise of peremptory challenges.

Subsection 4 envisions that where a juror has been exposed to information about the case itself, the trial judge should give counsel liberal opportunity to explore the substance of that prior exposure. At the same time, the questioning should be supervised by the trial judge, who has the responsibility to prevent its abuse. The Supreme Court has "stressed the wide discretion granted to the trial courts in conducting voir dire in the area of pretrial publicity and other areas that might tend to show juror bias." *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991).

Subdivision C.

This subdivision presents for-cause challenge procedures that have been found effective and is drawn from Standard 15-2.5 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

In order to guarantee trial by an impartial jury, this subdivision provides that a prospective juror should be excused if, after voir dire, the court has a reasonable doubt that the juror is capable of hearing the case with impartiality. Exclusion is accomplished through the court's granting of a challenge for cause. Because juror impartiality is required to preserve the integrity of the judicial system, challenges for cause should not be limited in number. *Gray v. Mississippi*, 481 U.S. 648 (1987). Under this subdivision, a challenge for cause may be initiated by either party or at the court's own initiative.

Ordinarily, the grounds to sustain a challenge for cause are enumerated by statute in each jurisdiction. This subdivision encourages jurisdictions to develop a list of grounds for which a challenge for cause will be granted and is premised on the belief that expressly stated standards will help assure that the winnowing of unfit jurors follows a process based on sound, clear reasoning. The subdivision also enumerates those bases for challenge that should, at a minimum, serve as grounds for a challenge for cause. These include an interest in the outcome of the case, a bias for or against one of the parties, a failure to meet the qualifications established by law for jury service, a familial relation to a participant in the trial or an inability or unwillingness to hear the case fairly and impartially.

The general grounds are designed to exclude the prospective juror who, consciously or unconsciously, is unable to act impartially as required by law. To achieve that goal in particular cases it may be necessary to sustain challenges for cause on other bases as well. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("juror[s] who will automatically vote for the death penalty in every case," or are unwilling or unable to give meaningful consideration to mitigation evidence must be disqualified from service); s*ee also* ABA GUIDELINES FOR THE APPOINTMENT

AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.10.2, and cmt. (rev. ed. 2003).

Because prospective jurors may be unwilling to disclose their biases, subsection 3 advises careful questioning during voir dire. *See Dingle,* 759 A.2d at 824-27. Hans & Jehle, *supra,* at 1194-1201.

The fact that a particular jurisdiction has enumerated statutory grounds for exclusions for cause should not preclude the exclusion of potential jurors on other non-enumerated grounds. The trial court has wide discretion in determining whether a particular juror should be excused absent a specifically enumerated ground. *Washington v. State*, 98 So. 605, 606 (Fla. 1923). Generally, a juror's response that he or she can render a fair and impartial verdict should be given great weight, but the court is not bound by the juror's response, and may excuse a juror for cause notwithstanding that juror's claim of an ability to be impartial.

The trial court is a fact-finder when it rules on challenges for cause. Because a juror's credibility depends on his or her answers to the court's or counsels' questions as well as his or her demeanor, it is important that the court evaluate both when making such a ruling. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994); *Dingle*, 759 A.2d at 829.

Subdivision D.

This subdivision is drawn from Standard 9 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993). It establishes the framework for the use of peremptory strikes.

Beginning in 1986, the Supreme Court established that peremptory strikes of prospective jurors were not beyond judicial scrutiny. In *Batson v. Kentucky,* 476 U.S. 79 (1986) and subsequent decisions, the Supreme Court has affirmed the constitutional principle that peremptory strikes may not be exercised to discriminate against citizens based on their race, ethnicity or gender. Beginning with Justice Thurgood Marshall's dissent in *Batson,* several jurists and members of the legal academy have advocated abolition of peremptories. *Id.* at 102; Morris B. Hoffman,

Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. CHI. L. REV. 809 (1997); *Minetos v. City Univ.*, 925 F.Supp. 177 (S.D.N.Y. 1996); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995); JEFFREY ABRAMSON, WE THE JURY, Ch. 2 (1994).

Despite the fact that peremptories may not be constitutionally required and are sometimes subject to abuse, this long-standing feature of trial by jury remains necessary for several reasons. Peremptories enable parties to exclude jurors they suspect of bias, but with respect to whom they lack sufficient proof of bias to sustain a challenge for cause. *Swain v. Alabama*, 380 U.S. 202, 220 (1965). The Supreme Court declared in *Swain* that peremptory challenges are essential to achieving a fair trial by jury because they enable parties to eliminate extremes of partiality and result in juries more likely to decide cases on the basis of the evidence. Although, as stated in *Batson*, a peremptory challenge can be highly subjective and may be "exercised without a reason stated, without inquiry and without being subject to the court's control," its risks must be balanced against its benefits. *Id.* For example, one important advantage of peremptories is that they allow the parties, especially defendants in criminal proceedings, to participate in the construction of the tribunal that is to judge them. John H. Mansfield, *Peremptory Challenges to Jurors Based Upon or Affecting Religion,* 34 SETON HALL L. REV., 435, 450 (2004). Further, eliminating peremptory strikes could destroy an important safeguard against judicial error in the administration of challenges for cause. Especially in courts with huge case dockets and diminished resources, peremptory strikes can be a necessary tool for litigants who face customs and practices that make jury selection an extremely abbreviated part of the trial. Smith, *supra*. Indeed, research suggests that effective questioning during voir dire combined with careful, but limited, use of peremptory strikes may be the best way to obtain a fair and impartial jury. Shari Seidman Diamond et al., *Realistic Responses to the Limitations of Batson v. Kentucky,* 7 CORNELL J. L. & PUB. POL'Y 77 (Fall 1997).

To promote uniform statewide practice in this area, the subdivision recommends that both the permissible number of peremptory

challenges and the procedures for exercising those challenges be clearly established. All fifty states currently permit peremptory challenges, usually allocating the same number to each party and, in criminal cases, increasing the number allotted as the severity of the charge increases. Note, *Developments in the Law—Race and the Criminal Jury*, 101 HARV. L. REV. 1557, 1565 (1988); *see* Note, *Rethinking Limitations on the Peremptory Challenge,* 85 COLUM. L. REV. 1357, 1359-60 (1985); SARAH SHARP, THE FLORIDA BAR, JURY SELECTION Ch. 7 (2001). Although the number of challenges is usually specified, only a few jurisdictions set forth the order and manner in which peremptory challenges are to be exercised. *See* JON VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 169 (1977). As a result, practices vary within as well as among the states. This subdivision recommends that trial judges allow a reasonable number of peremptories. While the number should not be excessively large, it should not be limited to just one or two. Rather, there should be enough challenges "to protect the right to 'unpick' the few jurors who don't feel right." Myron Moskovitz, *You Can't Tell a Book By Its Title,* 8 CRIM. L. F. 125, 138 (1997).

This subdivision recommends that trial judges, in both federal and state courts, be given the authority to permit parties to exercise additional peremptory challenges in certain cases. This is already the case in a number of circumstances in federal court. For example, under Federal Rule of Criminal Procedure 24(b), multiple defendants charged with a non-capital felony "may" be given additional peremptory challenges at the trial court's discretion. FED. R. CRIM. P. 24(b); *see, e.g., United States v. Magana*, 118 F.3d 1173, 1206 (7th Cir. 1997); *State v. Cambara*, 902 F.2d 144, 147-49 (1st Cir. 1990). Moreover, Rule 24(c) provides that a defendant shall have an additional peremptory challenge if up to two alternate jurors are to be seated. FED. R. CRIM. P. 24(c); *see* William Pizzi & Morris Hoffman, *Jury Selection Errors on Appeal,* 38 AM. CRIM. L. REV. 1391, 1441 (2001). In civil trials under the federal system, 28 U.S.C. § 1870 provides that, while each party shall be entitled to three peremptory challenges, the trial court may allow multiple plaintiffs or defendants to have additional peremptory challenges and permit them to be exercised

separately or jointly. David Baker, *Civil Case Voir Dire and Jury Selection,* 1998 FED. CTS. L. REV. 3, 1.2. This subdivision urges state court judges be given the same authority.

This subdivision, together with subsections E.1 and E.2 advocates the use of the "struck jury system." There are a number of procedural variations of this system, but the basic pattern is as follows: (1) A panel is brought to the courtroom equal to the number of jurors and alternates to be seated plus the total number of peremptory challenges available to the parties and the statistically projected number of those likely to be removed for cause; (2) The panel is questioned as a whole by the judge and counsel with follow-up questions to individual panel members, and removals for cause are made; (3) After the examination has been completed, the parties exercise their peremptory challenges "by alternate striking of jurors' names from a list passed back and forth between counsel," rather than orally; (4) The jury is impaneled after all sides have passed or exercised their peremptory challenges; and (5) If some challenges are passed and more prospective jurors remain than are needed, the unstruck names are called in the order they appear on the list until the prescribed number of jurors and alternates are seated. Bettina B. Plevin, *Current Development in Federal Civil Practice,* 706 PLI/LIT 403, 452-53 (2004); G. Thomas Munsterman et al., *The Best Method of Selecting Jurors,* JUDGES. Summer 1990, at 8.

This procedure benefits the parties by permitting them to compare all the prospective jurors before striking the most objectionable. Thus a party will not be caught in the dilemma of accepting a person who may be somewhat partial for fear that his or her replacement may be even more partial, and counsel do not need to hold one peremptory challenge in reserve to guard against the possibility that a particularly partisan panel member may be called into the box after most of the jury has been selected. The procedure benefits prospective jurors by eliminating the embarrassment of being challenged and asked to step down from the jury box for no apparent reason. Strikes are made by drawing a line through a name on the list of panel members rather than orally. The process focuses on the affirmative choice of the final

jurors rather than on the disqualification of individuals along the way. In the traditional jury box or sequential method, a challenge regarding the use of a peremptory for a constitutionally impermissible reason (discussed in subdivision F. below) cannot be sustained without calling a new panel, because prejudice between the prospective juror and the party exercising the challenge has been established. The struck jury method allows such challenges to be made and acted upon without the knowledge of the potential jurors. It also provides an opportunity for more prospective jurors to be considered for service on a jury. Finally, it benefits the court system by shortening the voir dire process. There is no need to repeat questions to each replacement for a person removed for cause, and there is less pressure on counsel to question each prospective juror exhaustively. The comparative choices that have to be made tend to become apparent early, and the parties can limit their questions to the few panel members involved.

It should be noted that nothing in this subdivision is intended to limit the authority of the trial judge to require special procedures in unusual cases to protect the integrity and fairness of the trial process. Thus, in cases in which there has been extensive publicity, for example, the trial judge could still order that prospective jurors be questioned individually, out of the hearing of the other members of the panel. ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 8-3.5 (1991).

Subdivision E.

This subdivision is drawn from Standard 15-2.7 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision supplements the prior subdivision and specifies procedural mechanisms for striking prospective jurors from the panel pursuant to the "struck method."

Subsection E.3 provides that a party should have the opportunity to assist counsel before any challenges are exercised. It also provides that counsel in multiple party cases should be allowed to consult with each other about the exercise of challenges.

Subsection E.4 rejects the practice used in some courts of individually swearing jurors before the entire jury panel has been selected. This kind of segmentation often forecloses strikes to jurors once passed in the questioning. It makes impossible the evaluation of the panel as a whole. It also prevents a later challenge of a sworn juror in the event that a problematic relationship between that juror and others later selected should arise. Additionally, the sequential swearing of jurors makes it difficult to determine claims of former jeopardy. Since jeopardy attaches at the time that the jury is sworn, *Crist v. Bretz,* 437 U.S. 28, 35 (1978), the sequential swearing of individual jurors raises a question about the time when jeopardy has attached. *People v. Lawton*, 487 N.Y.S. 2d 273 (N.Y. Sup. Ct. 1985); *United States v. Raymer*, 941 F.2d 1031, 1038 (10th Cir. 1991).

Subdivision F.

This subdivision is drawn from Standard 15-2.8 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996). Subdivision F. incorporates the three-step hearing process established by the Supreme Court for addressing unlawful discrimination against prospective jurors based on their race, gender, or ethnicity.

Our judicial and political systems have developed an increased sensitivity to discrimination against citizens for constitutionally impermissible reasons. This sensitivity is demonstrated, for example, by the expansion of the definition of constitutionally cognizable groups and by the passage of broad-based civil rights legislation, *e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In this same vein, the Supreme Court has invalidated the use of the peremptory challenge for purposeful racial discrimination. *Batson v. Kentucky*, 476 U.S. 79 (1986). Since then the Court has wrestled with the inherent conflict between the nature of the peremptory challenge itself, a traditionally unreviewable exercise of counsel's discretion, and the obligation of trial judges to ensure that the courts are not used as a mechanism for discrimination against citizens. Eric L. Muller, *Solving the Batson*

Paradox: Harmless Error, Jury Representation and the Sixth Amendment, 106 YALE L.J. 93 (1996).

In the context of a criminal prosecution, the *Batson* Court held that race-based challenges are unconstitutional under the Equal Protection Clause of the 14th Amendment. In facing alleged violations under this new rule, the High Court instructed trial courts to presume that the party utilizing peremptory challenges used them legitimately. To overcome that presumption, an objecting party needs to make a prima facie case that the exercised peremptory challenges were race-motivated. A defendant makes a prima facie case if he or she proves membership in a cognizable racial group, and that members of that group were eliminated by the prosecutor's selective exercise of peremptories. *Batson*, 476 U.S. at 96. *Batson* also requires the objecting party to show that "relevant circumstances raise an inference" of intentional discrimination. *Id.*; s*ee* Daniel Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2472-73 (2003).

Once that showing is made, the second step begins and the burden shifts to the challenged party to articulate a neutral reason for the peremptory strike. In *Purkett v. Elam*, 514 U.S. 765 (1995), the Court said the explanation proffered need not meet the requirements of a challenge for cause nor be persuasive. However the explanation must not deny equal protection.

Finally, *Batson* requires the trial court to evaluate the credibility of the party offering the neutral reason for the challenge. Some courts now not only evaluate the credibility of the person offering the reason, they also evaluate the credibility of the reason asserted to determine if the challenge was unconstitutional. *See, e.g., Green v. State*, 583 So. 2d 647 (Fla. 1991). If the court finds the proffered neutral reason is a mere disguising of discriminatory intent, then the trial court must permit the challenge. *See Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

Although the *Batson* court did not spell out when a facially-neutral explanation is pretextual, some courts have identified relevant factors that should be considered when deciding whether a proffered reason is pretextual. For example, in 1987, the Alabama

Supreme Court provided its trial and appellate courts an exhaustive list of the types of evidence that may raise the inference of discrimination. *Ex Parte Branch,* 526 So. 2d 609, 622-24 (Ala. 1987); *see also* Tracy Choy, Note, *Branding Neutral Explanations Pretextual Under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection,* 48 HASTINGS L.J. 577 (1997).

The *Batson* rule now applies regardless of the race of the potential juror or the defendant, *Powers v. Ohio*, 499 U.S. 400 (1991), whether the challenging party is the defense or the prosecution, *Georgia v. McCollum*, 505 U.S. 42 (1992), whether the challenge is to race-based or gender-based strikes, *J.E.B. v. Alabama ex. rel. T.B.,* 511 U.S. 127 (1994), or whether the case is civil or criminal, *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991). Reflecting respect for this robust development of the *Batson* doctrine, subsections F.2 through F.5 concisely replicate the above-described requirements of the three-part hearing. The *Batson* line of cases also highlight the fact that peremptories can deprive citizens of both the right and the duty to take part in trials. A central concern of this jurisprudence is to protect the integrity of our judicial system. It is clear that courts must be vigilant for unconstitutional peremptory strikes of which the proponent's adversary is not even aware. In such a situation, the Court instructs trial judges, on their own initiative, to challenge suspicious strikes. Accordingly, subsection F.5 promotes judicial leadership in initiating an inquiry under subsection F.3 when counsel fails to do so. Further, in order to preserve an appellate record, subsection F.5 urges trial courts to record the reasons and the factual bases for their rulings.

Subdivision G.

This subdivision is drawn from Standard 15-2.9 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision provides the general framework for an alternate juror system. It leaves the initial decision to impanel alternate jurors and the number of alternate jurors to be impaneled to

the court's discretion, recognizing that the trial judge is best positioned to balance the factors relevant to deciding on use of alternate jurors in a given case. This reduces the likelihood that the alternate juror decision can be used as a tactic to obtain a mistrial.

The need for alternates is usually prompted when a regular juror becomes or is found to be unable or disqualified to perform further jury service. This subdivision contemplates replacement of the juror when the impairment is first discovered.

This subdivision does not prescribe a particular procedure to be followed whenever the court considers excusing a juror and impaneling an alternate. At a minimum, however, the court should hold an on-the-record hearing reflecting why the court excused the juror. Courts have generally held that such a hearing may be summary in nature and need not have all the formalities of a trial. W.J. Dunn, Annotation, *Constitutionality and Construction of Statutes or Court Rule Relating to Alternate or Additional Jurors or Substitution of Jurors During Trial*, 84 A.L.R. 2d 1288 § 8 (2004).

This subdivision counsels that alternate jurors be selected, qualified, examined and sworn in as regular jurors. Accordingly, if an alternate substitutes for a regular juror, the alternate will have met all of the requirements for selection and qualification as a regular juror. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation. As Judge William Schwarzer has pointed out "when none of the jurors regard themselves as supernumeraries likely to be excused before deliberations begin, they will all be more attentive and responsible." William Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 582 (1991).

A particularly difficult question is whether a regular juror who must be excused for some reason should be replaced by an alternate juror after deliberations have begun. *See* Jon D. Ehlinger, Note, *Substitution of Alternate Jurors During Deliberations*, 57 NOTRE DAME L. REV. 137 (1981); Douglas J. McDermott, Note, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial*, 35 B.C. L. REV. 847 (1994). It is efficient and expedient to permit

substitution of alternates even after deliberations have begun. Additionally, it has been held constitutionally permissible. This Commentary, however, urges its rejection. The juror who is not part of the deliberative process has not been exposed to the jury discussion which occurred prior to the substitution. As a result, substitution of an alternate at this point increases the risk of the jury returning a verdict based upon a less-than-thorough examination and discussion of the evidence. *Johnson v. Duckworth*, 650 F.2d 122 (1981).

Subsection G.3 seeks to help address the concern that juries numbering less than twelve present significant disadvantages compared to juries of twelve. By allowing alternates to deliberate and vote where the total number is twelve or fewer, these drawbacks can be minimized. Moreover, this provision is intended to afford citizens respect for investing their time and energy in the case. Consistent with the longstanding view that jury service is not only a civic duty but an opportunity to participate in the administration of justice, alternate jurors should taste the fruits of their time spent in the courtroom.

Subdivision H.

Subdivision H. proposes that the use of anonymous juries be limited to compelling circumstances that are demonstrated to the trial court.

There is general agreement that an anonymous jury is one for which, at a minimum, the last names of jurors are not disclosed. G.M. Buechlien, Annotation, *Propriety of and Procedure for, Ordering Names and Identities of Jurors to be Withheld from Accused in Federal Criminal Trial: Anonymous Juries*, 93 A.L.R. Fed. 135 (1989).

The first anonymous jury trial in recorded American history took place in 1977 in New York. *United States v. Barnes,* 604 F.2d 121 (2nd Cir. 1979). Since then, courts have developed a non-exhaustive list of factors to guide them in deciding whether to conceal the identities of jurors. These factors include: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the

defendant's past attempts to interfere with the judicial process; (4) the fact that the defendant faces a lengthy prison term or substantial fine; and (5) extensive media publicity. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 4.04: (5th ed. 2000); Abraham Abramovsky & Jonathan I. Edlestein, *Anonymous Juries; In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT 457 (1999).

Subdivision H. is premised on those core legal values that uphold public trials and the presumption of innocence. Open court proceedings serve the critical goals of public education and engendering public trust and confidence in the courts. The use of anonymous juries erodes the presumption of innocence and makes juries less accountable. The subdivision recognizes that using juror anonymity as a default mechanism constitutes a shortsighted approach to a complex issue. Without reasonable grounds to show a genuine problem in a particular case, anonymous juries should not be used, due to the implications of bias they present: "An anonymous jury raises the specter that the defendant is a dangerous person from whom jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence." *United States v. Ross,* 33 F.3d 1507, 1519 (11th Cir. 1994).

Besides the risk of polluting the minds of jurors, the imposition of anonymity can make voir dire more cumbersome and inefficient. Anonymity may create additional roadblocks for obtaining important information about the biases or impairments of prospective jurors which, in turn, would conflict with the values promoted by the various provisions of Principle 11.

The factors weighing in favor of open juries are overwhelming. Accordingly subdivision H. strongly discourages anonymous jury trials. *See* SUPREME COURT OF ARIZONA, SUPPLEMENTAL REPORT OF THE JURY PRACTICES AND PROCEDURES COMMITTEE CONCERNING JUROR ANONYMITY (March 2003).

Conducting A Jury Trial

PRINCIPLE 12—COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS INSOFAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED

A. The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.

B. Trial judges should use modern trial management techniques that eliminate unnecessary trial delay and disruption. Once begun, jury trial proceedings with jurors present should take precedence over all other court proceedings except those given priority by a specific law and those of an emergency nature.

C. Jurors should be informed of the trial schedule and of any necessary changes to the trial schedule at the earliest practicable time.

Comment

This Principle seeks to minimize juror dissatisfaction by encouraging courts to manage trial time more effectively and to apprise jurors of trial developments and delays, so that jurors do not feel their time is being wasted. Because jury service is an involuntary obligation imposed by the government on its citizens, "the legal system should be required to maximize the usefulness of its citizens' contributions and minimize the negative experiences that may accompany the obligation." Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, 282, 283 (Robert E. Litan ed., 1993). Jurors often complain about the "repetition and redundancy of trial testimony." *Id.* at 289. Although some amount of repetition and redundancy may be useful for juror comprehension and recall, the court should utilize its power to impose reasonable time limits. The court should also

minimize undue disruption and delay, and, to reduce juror frustration, should explain to the jurors why delay occurs and why the legal system tolerates it. *Id.* at 289.

The court's power to impose reasonable time limits for trial derives from its inherent power and from codified sources such as Federal Rules of Civil Procedure 16(c)(4) and (15), Federal Rules of Evidence 403, 611(a) and 102, and analogous provisions in force in most states. *See Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500 (9th Cir. 1995); s*ee also, e.g.*, *Hicks v. Commonwealth,* 805 S.W.2d 144, 151 (Ky. Ct. App. 1990): *Varnum v. Varnum,* 586 A.2d 1107, 1114-15 (Vt. 1990); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 21.653, 22.35 (1995); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 712 (1993). In addition to reducing wasted juror time, by shortening trials, time limits maximize court resources and reduce litigant costs. Longan, *supra,* at 707. By deterring unnecessarily prolonged litigation, time limits also promote clearer, more succinct, and less expensive lawyering. Reagan W. Simpson & Cynthia A. Leiferman, *Innovative Trial Techniques; Timesaving Litigation Devices or Straight Lines to Disaster?,* 26 Fall Brief 21, 23 (1996). Time limits must be reasonable in light of the circumstances of the case, they must be flexible and they cannot be arbitrary. *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987).

To better manage trial resources, a significant number of judges and trial lawyers favor the "chess clock" approach to trials, in which the court gives each side a fixed amount of time to present its case after consultation with both parties. Patricia Lee Refo, *The Vanishing Trial,* LITIGATION, Summer 2004, at 1; Longan, *supra*; Donald G. Alexander, *Let's Kick Abe Lincoln Out of the Courtroom or New Approaches to Conducting Trials*, 10 ME. B. J. 148, 149 (1995). The lawyer is free to allocate her time according to her own discretion, but she must stay within the total limits set by the judge. Refo, *supra*, at 2. Other judges advocate an approach under which excessive time spent on cross examination or objecting results in a time bonus allocated to the other side, William O. Bertelsman, *Right to a Speedy Trial: Judges Need to Set Time Limits for the Public's Sake,* 80 A.B.A. J. 116 (Oct.

1994), or where limits are defined contextually, such as 'cross cannot exceed direct.' Alexander, *supra,* at 149.

In addition to setting time limits, courts can streamline trials by limiting discovery, the number of issues to be addressed, the number of witnesses presented and the manner in which evidence is presented at trial. Alexander, *supra,* at 149. Courts can present uncontested evidence in the form of stipulations or pre-approved narrative statements read by counsel. Bertelsman, *supra,* at 116. Courts can also permit summaries of voluminous evidence and allow depositions to be edited. *Id.* Courts should inform jurors when time limits or other limits are in place so that jurors are aware that their time is valued and so that parties are not unnecessarily prejudiced. Alexander, *supra,* at 149.

PRINCIPLE 13—THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

A. Jurors should be allowed to take notes during the trial.

1. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be instructed that after they have reached their verdict, all juror notes will be collected and destroyed.

2. Jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations.

3. The court should ensure that jurors have implements for taking notes.

4. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate.

5. After the jurors have returned their verdict, all juror notes should be collected and destroyed.

B. Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court's preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute.

1. At the time of distribution, the court should instruct the jurors concerning the purpose and use of their trial notebooks.

2. During the trial, the court may permit the parties to supplement the materials contained in the notebooks with additional material that has been admitted in evidence.

3. The trial notebooks should be available to jurors during deliberations as well as during the trial.

C. In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.

1. **Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.**
2. **Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.**
3. **After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court should modify the question to eliminate any objectionable material.**
4. **After the question is answered, the parties should be given an opportunity to ask follow-up questions.**

D. The court should assist jurors where appropriate.

1. **The court should not in any way indicate to the jury its personal opinion as to the facts or value of evidence by the court's rulings, conduct, or remarks during the trial.**
2. **When necessary to the jurors' proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions.**
3. **The court should exercise self-restraint and preserve an atmosphere of impartiality and detachment, but may question a witness if necessary to assist the jury.**
   a. **Generally, the court should not question a witness about subject matter not raised by any party with that witness, unless the court has provided the parties an opportunity, outside the hearing of the jury, to explain the omission. If the court believes the questioning is necessary, the court should afford the parties an opportunity to develop the subject by further examination prior to its questioning of the witness.**

b. The court should instruct the jury that questions from the court, like questions from the parties, are not evidence; that only answers are evidence; that questions by the court should not be given special weight or emphasis; and the fact that the court asks a question does not reflect a view on the merits of the case or on the credibility of any witness.

E. The court should control communications with jurors during trial.

1. The court should take appropriate steps ranging from admonishing the jurors to, in the rarest of circumstances, sequestration of them during trial, to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.

2. At the outset of the case, the court should instruct the jury on the relationship between the court, the parties and the jury, ensuring that the jury understands that the parties are permitted to communicate with jurors only in open court with the opposing parties present.

3. All communications between the judge and members of the jury panel from the time of reporting to the courtroom for juror selection examination until dismissal should be in writing or on the record in open court. Each party should be informed of such communications and given the opportunity to be heard.

F. Jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

G. Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids.

H. In civil cases the court should seek a single, unitary trial of all issues in dispute before the same jury, unless bifurcation or severance of issues or parties is required by law or is necessary to prevent unfairness or prejudice.

I. Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.

J. The court may empanel two or more juries for cases involving multiple parties, defendants, or claims arising out of the same transaction or cause of action, in order to reduce the number and complexity of issues that any one jury must decide. Dual juries also may be used in order to promote judicial economy by presenting otherwise duplicative evidence in a single trial.

Comment

Subdivision A.

This subdivision, which encourages note taking by jurors, is drawn from three previous ABA standards endorsing the procedure: Standard 15-3.5 of the ABA CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY STANDARDS (1996); Standard 16(c) of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and ABA CIVIL TRIAL PRACTICE STANDARD 3 (1998).

The Federal Judicial Center has observed that "[p]ermitting jurors to take notes, once discouraged, has now become widely accepted." MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.42 (1995). The vast majority of courts recognize that it is within the sound discretion of the trial judge to permit jurors to take notes. *See, e.g.*, *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *Esaw v. Friedman,* 586 A.2d 1164, 1167-68 (Conn. 1991) (collecting cases); Note, *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1509-11 (1997).

Note taking is encouraged because "[t]here is abundant evidence that individuals tend to be better able to recall events and testimony if they have taken notes at the time; the very process of writing things down helps to encode the events in one's memory." BROOKINGS INSTITUTION, AMERICAN BAR ASSOCIATION SECTION OF

LITIGATION, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 18 (1992); *see also* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256 (1996); Note, *Developments in the Law*, *supra,* at 1509-11. Empirical evidence also suggests that the disadvantages typically associated with juror note taking are minimal, while the benefits are significant. *See* Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials,* 18 LAW & HUM. BEHAV. 121 (1994); *see also* David L. Rosenhan et al., *Notetaking Can Aid Juror Recall,* 18 LAW & HUM. BEHAV. 53 (1994).

After the jury has rendered its verdict, the jury's notes and/or notebooks are to be collected and destroyed by the bailiff or clerk. *See* ARIZ. R. CIV. P. 39.

Subdivision B.

This subdivision is drawn from Standard 2 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

Subdivision B. encourages the increasingly common practice of using juror notebooks to maximize comprehension of the evidence in appropriate complex cases. In addition to copies of the court's instructions, important exhibits (or salient excerpts from exhibits) and stipulations, contents may consist of any other aids to the understanding of the jury that the court finds appropriate in the circumstances. *See, e.g.*, *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1008 (2d Cir. 1995); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 22.32, 22.42 (1995); NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § IV-7 (G. Thomas Munsterman et al. eds. 1997) [hereinafter INNOVATIONS].

Empirical research on the effects of the use of multi-purpose juror notebooks reveals their benefits, especially when used in lengthy trials and cases involving complex evidence. *See*, *e.g.*, AMERICAN BAR ASSOCIATION, JURY COMPREHENSION IN COMPLEX CASES 34-37 (1989); Michael Dann & Valerie Hans, *Recent Evaluative Research on Jury Trial Innovations,* 41 COURT REV. 12, 16-17 (2004).

Subdivision C.

This subdivision is drawn from Standard 4 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998), which endorses responding to juror questions under controlled circumstances. The language is based, in large part, on Arizona Rule of Civil Procedure 39(b)(1) & (10) and Arizona Rule of Criminal Procedure 18.6(e).

State and federal courts, both in civil and criminal cases, have overwhelmingly recognized that whether to allow juror questioning of witnesses is a matter vested in the sound discretion of the trial judge. *See, e.g.*, *United States v. Bush*, 47 F.3d 511, 514-15 (2d Cir. 1995); *State v. Doleszny*, 844 A.2d 773 (Vt. 2004) (state and federal cases collected).

As the courts have observed, in the context of complex cases and complicated testimony, "[j]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror." *United States v. Sutton*, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992).

Juror questioning can materially advance the pursuit of truth particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony; juror satisfaction with the trial is also enhanced. *See e.g.,* AMERICAN JUDICATURE SOCIETY, TOWARD MORE ACTIVE JURIES: TAKING NOTES & ASKING QUESTIONS 11-14 (1991); *see also* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking,* 79 JUDICATURE 256 (1996); MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT TO THE COLORADO SUPREME COURT'S JURY SYSTEM COMMITTEE (2002).

The practice of jury questioning—especially oral questioning—has often been frowned upon, particularly in criminal cases, due to concern that it risks compromising jury neutrality, encouraging premature deliberations and unduly delaying the proceedings. These concerns can be addressed with proper precautions, as suggested in this subdivision, and a vigilant trial judge.

Ordinarily, the court should not invite or entertain questions from jurors until after the parties' examination and cross-examination of a witness has concluded. Counsel should generally be afforded wide latitude to try their cases as they see fit, and juror questions should be permitted on a purely supplemental basis.

If for any reason the judge refuses to ask a question submitted by a juror, the judge should explain to the jury that evidentiary rules may prohibit certain questions from being asked of the witness and the jurors should attach no significance to the fact that some of the questions were asked of the witnesses while others were not. If the judge modifies a question submitted by the jury, he or she should explain that the modification was made because of procedural or evidentiary rules. Adherence to these procedures and precautions should ensure the constitutional rights of the defendant in a criminal case and all parties to any civil action. *See* INNOVATIONS, *supra,* at § V-7.

Subdivision D.

This subdivision is drawn from Standard 15-4.2 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1993) and Standard 10 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

Subsection D.1 specifies a preferred practice from among the existing practices of the state and federal systems with respect to the issue of a judge expressing her or his personal opinion to the jury. Even where the federal or state constitution gives the trial judge the right to express an opinion concerning the merits of the case, the judge is not under an obligation to do so, and the better practice is that the judge not do so. *See* CAL. CONST. Art. 6, § 10; CAL. PENAL CODE § 1127 (1970).

In the federal system, a trial judge is permitted to summarize and to comment upon the evidence and to express an opinion as to the facts of the case, provided that the judge makes it clear that the resolution of disputed facts is a matter for the jury alone. *Gant v. United States*, 506 F.2d 518, 520 (8th Cir. 1974). A decision will ordinarily not be reversed on appeal because of such

comments unless the appellate court finds that they were prejudicial to the losing party, particularly where the jury is instructed that they are the sole judge of the facts.

Although the judge in the federal system is permitted to comment on the evidence, it has also been held to be reversible error for the judge to express an opinion concerning the merits of the case. *See, e.g.*, *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1976); *United States v. Van Horn*, 553 F.2d 1092 (8th Cir. 1977). This practice has been upheld, however, if there is no question of fact and only a question of law remains. *See Gant*, 506 F.2d at 518. Prejudicial remarks of the trial judge disparaging either party have, however, been held to constitute error requiring a new trial. *See* J. R. Kemper, Annotation, *Prejudicial Effect of Trial Judge's Remarks, During Criminal Trial, Disparaging Accused,* 34 A.L.R. 3d 1313 (1970).

In most state courts, the authority of the trial judge to express an opinion on the credibility of the evidence or on the merits of the case is more circumscribed than in the federal system. In the state courts, the judge is looked upon as an impartial arbitrator, the "governor" of the trial for the purpose of "assuring its proper conduct and the fair and impartial administration of justice." *Id.* at 1319.

As in the federal system, however, improper statements of the trial judge will not generally be considered grounds for reversal unless they can be shown to have been prejudicial to the complaining party. Various factors which are analyzed in considering potential prejudicial effect are the degree of intemperateness of such remarks, the manner in which the remarks are delivered and the surrounding or receptive circumstances affecting their impact. *Id.*

In addition, it has been held that the error may be cured by the trial judge through the use of subsequent curative instructions. *See, e.g.*, *People v. Miller*, 170 P. 817 (Cal. 1918); *Poff v. State*, 241 A.2d 898 (Md. 1968); *State v. Green*, 151 S.E.2d 606 (N.C. 1966); *but see People v McNeer*, 47 P.2d 813 (Cal. App. 1935); *State v. Bryant*, 126 S.E. 107 (N.C. 1925).

Occasions may arise during the trial when it is appropriate, even necessary, for the court to instruct the jury. Subsection D.2

deals with those occasions on which an instruction, to be most effective, should be given during the trial itself, and should not be delayed until the conclusion of the evidence. For example, when there are multiple defendants and evidence is offered which is admissible only against one of them, the trial judge should give the jury a limiting instruction at that time rather than wait until the end of the trial. The court should advise the jury as to the limited use or admissibility of the evidence.

This approach is not intended to affect the authority of the judge, at the beginning of the trial, to give preliminary instructions to the jury deemed appropriate for guidance in hearing the case.

Subsection D.3 starts from the premise that witness questioning is ordinarily for counsel, not the court. The basic principle that the trial judge "should exercise self-restraint and preserve an atmosphere of impartiality and detachment" is drawn from Judge Augustus Hand's opinion in *Pariser v. City of New York*, 146 F.2d 431, 433 (2d Cir. 1945). *See People v. Hawkins*, 43 Cal. Rptr. 2d 636 (1995); *People v. Melendez*, 643 N.Y. S.2d 607, 608-09 (App, Div. 1996); MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.24 (1995). This subsection nonetheless recognizes that for certain limited purposes the trial court may "question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side." *United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996).

The corollaries articulated under subsection D.3 are drawn from practice and reflect numerous decisions. *See, e.g.*, *United States v. Dreamer*, 88 F.3d 655, 659 (9th Cir. 1996); *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995); *United States v. Gonzalez-Torres*, 980 F.2d 788 (1st Cir. 1992); *Van Leirsburg v. Sioux Valley Hosp.*, 831 F.2d 169 (8th Cir. 1987); *United States v. Block,* 755 F.2d 770 (11th Cir. 1985); *Lane v. Wallace*, 579 F.2d 1200 (10th Cir. 1978). *See generally* 2 STEPHEN SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1005-06 (6th ed. 1994); MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.24 (1995).

In dealing with inexperienced counsel, particularly those with little or no trial experience, the court from time to time may interject questions without consulting counsel in order to save time.

This may be especially appropriate when opposing counsel makes numerous objections to the form of questions and those objections have merit. The court may suggest to counsel questions that would avoid objections as to form.

In any case in which the court asks more than a few questions, at a recess when the jury is absent, the court should, inquire whether counsel believe the court's questions were either objectionable or otherwise counterproductive. Although objections may be made outside the presence of the jury under Federal Rule of Evidence 614(c) and analogous rules in effect in most states (*see* 2 GREGORY JOSEPH & STEPHEN SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 48.2, 48.3 (Supp. 1994)), counsel often will be reluctant to volunteer objections to the court's questions. The court can ameliorate counsel's concern about questioning the court's decision to intervene with a witness by inviting counsel's views. Although the court has the power to call witnesses under Federal Rule of Evidence 614(a) and analogous state law provisions, this power is rarely exercised, probably because the court has no opportunity to prepare a witness to testify and may, by calling an unprepared witness, inject evidence into a case that might damage a party unfairly. The court, especially in a bench trial, may invite a party to explain the failure to call a witness, particularly when the failure to call a witness might give rise to an adverse inference. The court should, however, bear in mind that the party may have made a conscious and informed judgment not to call the witness, and that judgment should ordinarily be respected.

Subdivision E.

This subdivision is drawn from Standard 15-4.1. of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

This subdivision concerns judicial control over contacts with jurors once the jury has been sworn to try the case. Subsection E.1 deals with the steps that should be taken by the trial judge to insulate the jurors from extraneous prejudicial information. Subsection E.2 calls for the trial judge to instruct the jury on the

authority of counsel to address the jury only in open court. Subsection E.3 provides that the court should ensure that a record of judicial contact with jurors is maintained, and provides that contact between judge and jury should occur only in open court.

Subsection E.1 gives the trial judge broad discretion to take steps necessary to ensure that the jury is protected from improper prejudicial influences, ranging from mere admonition of the jurors to avoid exposure to prejudicial material to sequestration of the jury. *See, e.g.*, *United States v. Turkette*; 656 F.2d. 5 (1st Cir. 1981); *Harrell v. Israel*, 672 F.2d 632 (7th Cir. 1982); *United States v. Shackelford*, 777 F.2d. 1141 (6th Cir. 1985). In an ordinary case, admonishing jurors to avoid potentially prejudicial material and supplying them with prominent badges identifying them as jurors should be sufficient to insulate them from improper approaches. In addition, the trial judge should use his or her authority, when necessary, to control the conduct of others who may attempt to interfere with the impartiality of the jury. Some state statutes specifically address the issue and regulate conduct of the public or press in the environs of the courthouse. N.Y. PENAL LAW § 21.5.50(7) (1975). Because of the importance of insulating the jurors during the course of the trial and deliberations, courthouse facilities should be arranged to minimize contact between the jurors and parties, counsel and the public.

Actual sequestration is burdensome on jurors, but may be justifiable when it reasonably appears to be the only means of guarding against palpable risks. The trial judge should not order sequestration except under compelling circumstances and only for the purpose of insulating the jury from improper influences or threatened harm. Moreover, when sequestration is ordered, the jury should not be told which party, if any, requested the sequestration.

The vital role the jury plays in the American judicial system makes it imperative that all communications to or from the jury regarding the case be put on the record. This is part of the general obligation of the judge concerning the record of the proceedings. Communication between the judge and jurors, because of the singular position of the judge, must also be particularly guarded. Communications between the jurors and the court should be in writing, and delivered to the bailiff for transmission to the court.

Subsection E.2 makes it clear that the responsibility to ensure juror impartiality extends to counsel and the parties as well as the court. At the very least, the appearance of impartiality is compromised if counsel or parties converse with jurors outside open court, and therefore such contact is forbidden. A danger, however, is that a juror who is unaware of the limitation on counsel and the parties may regard their reluctance to speak to him or her as an affront or bad manners. The trial judge should instruct the jurors at the outset of the trial that their reluctance to speak is an obligation imposed on them by the court in an effort to protect the system.

Subsection E.3 is not intended to apply to communications to or from jurors involving only housekeeping matters; nor is it intended to require a judge to refrain from giving a juror a civil greeting when they pass each other in a corridor or elsewhere. However, to the extent practicable, even housekeeping matters should be reduced to writing and communicated on the record in order to eliminate future misunderstandings.

Subdivision F.

Subdivision F. allows, in the court's discretion, jurors in civil cases to discuss evidence among themselves in the jury room during the trial. The substance of subdivision F. is drawn from Rule 39(f), Arizona Rules of Civil Procedure and case law. *See also Winebrenner v. United States*, 147 F.2d 322 (8th Cir. 1945); *United States v. Klee*, 494 F.2d 394 (9th Cir. 1974); *Meggs v. Fair,* 621 F.2d 460 (1st Cir. 1980).

In exercising its discretion to limit or prohibit jurors' permission to discuss the evidence amongst themselves during recesses, the court should consider the length of the trial, the nature and complexity of the issues, the makeup of the jury, and other factors that may be relevant on a case by case basis. ARIZ. R. CIV. P. 39(f), cmt. 1995 Amendments.

State and federal trial judges who have studied juries and jury trials advocate use of this procedure, given its potential to improve juror comprehension by recognizing jurors' natural impulses to discuss at least limited aspects of their shared experience

with fellow jurors as the trial unfolds. *See e.g.*, B. Michael Dann, "*Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1261-68 (1993); William Schwarzer, *Reforming the Jury Trial*, 132 F.R.D. 575, 593-94 (1991).

Recent empirical studies of structured juror discussions of the evidence during actual trials of civil cases found that allowing discussions did not lead to premature judgments in cases by jurors, enhanced juror understanding of the evidence in the more complex cases, served to decrease the incidence of "fugitive discussions" of the trial by jurors with family and co-workers and met with high levels of acceptance by jurors, judges and trial counsel. *See, e.g.*, Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003); Paula Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform,* 24 LAW & HUM. BEHAV. 359 (2000); Valerie Hans, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants,* 32 MICH. J. L. REV. 349 (1999).

Subdivision G.

This subdivision is drawn from Standard 15-4.2. of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Subdivision G. encourages trial judges to consider, consistent with the rights of the parties, mechanisms that might be adopted to improve juror understanding of the issues and the efficiency of trial. In recent years, a number of innovative procedures have been used in different courts. Procedures to consider include pre-instruction, pre-trial tutorials, interim summaries, mini-closings and a broad range of graphic techniques to enhance juror comprehension and retention of information. Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Schwarzer, 132 F.R.D. 575; INNOVATIONS, *supra*, at §§ IV-3, IV-9 and IV-10.

Subdivision H.

Subdivision H. favors a single unitary trial in civil cases on all issues in dispute before the same jury, unless bifurcation is required by law. A single jury minimizes the inconvenience to jurors and the cost and expense to litigants. Moreover, lay and expert witnesses can often be substantially inconvenienced by having to appear at both portions of a bifurcated trial. Additionally, bifurcation may dramatically favor one side over the other—in some cases predetermining the ultimate outcome of the trial in ways that would not occur under this rule. *See* INNOVATIONS, *supra*, at § IV-8. *See also* Albert P. Bedecarré, *Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases*, 17 ENVT'L. AFF. 123 (1989); Douglas L. Colbert, *The Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993); Jennifer M. Granholm & Williams T. Richards, *Bifurcated Justice: How Trial—Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505 (1995), Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages,* 1998 WISC. L. REV. 297.

Subdivision I.

Subdivision I. encourages the presentation of live testimony as opposed to transcripted or recorded testimony. Live testimony leads to increased juror involvement, comprehension and satisfaction. Further, interactive jury innovations, such as juror questions to witnesses, would be difficult to implement without the benefit of live testimony. *See* INNOVATIONS, *supra*, at § V-2; *see also* Marshall J. Hartman, *Second Thoughts on Videotaped Trials*, 61 JUDICATURE 256 (1978); *Gray v. United States Dep't of Agric.*, 39 F.3d 670 (6th Cir. 1994).

Subdivision J.

Subdivision J. advocates the use of two or more juries in cases involving multiple parties or multiple claims arising out of the

same transaction or cause of action. In practice, multiple juries are generally impaneled separately. Opening and closing statements should be presented separately. Jury instructions for each jury should be developed separately and they should reference only the facts or law presented to that particular jury. Separate juries deliberate separately and deliver separate verdicts. Dual juries reduce the risk that a jury will incorrectly consider evidence or testimony introduced for another purpose. Further, dual juries can often reduce the emotional burden for victims of crime who would otherwise have to testify twice. *See* INNOVATIONS, *supra*, at § V-4. *See also United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972).

Jury Deliberations

PRINCIPLE 14—THE COURT SHOULD INSTRUCT THE JURY IN PLAIN AND UNDERSTANDABLE LANGUAGE REGARDING THE APPLICABLE LAW AND THE CONDUCT OF DELIBERATIONS

A. All instructions to the jury should be in plain and understandable language.

B. Jurors should be instructed with respect to the applicable law before or after the parties' final argument. Each juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations.

C. Instructions for reporting the results of deliberations should be given following final argument in all cases. At that time, the court should also provide the jury with appropriate suggestions regarding the process of selecting a presiding juror and the conduct of its deliberations.

D. The jurors alone should select the foreperson and determine how to conduct jury deliberations.

Comment

Principle 14 recognizes that jurors, as fact finders, are responsible for applying the relevant law to the facts. The court instructs the jurors on the relevant law and, as a result, courts have a responsibility to take measures that facilitate jurors' understanding of the law.

Principle 14 has its roots in Standard 15-4.4 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996) and Standard 16 of the ABA STANDARDS RELATING TO JURY USE AND MANAGEMENT (1993).

Subdivision A.

Subdivision A. addresses the goal of juror comprehension by directing courts to instruct the jury in plain and understandable

language. Jury instructions, which accurately state the law, may nonetheless be incomprehensible to a jury of lay persons. The "pattern," "standard" or "uniform" jury instructions that are overwhelmingly used today were developed to conserve the time of lawyers and judges, reduce the number of appeals and reversals caused by erroneous instructions and increase juror comprehension of the applicable law. But, in the late 1970's and early 1980's, empirical studies revealed that the standard instructions fell short of increasing juror comprehension. Amiram Elwork et al., *Toward Understandable Jury Instructions,* 65 JUDICATURE 432 (1982); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC'Y REV. 153 (1982); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions,* 79 COLUM. L. REV. 1306 (1979). Recent studies have discovered that jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese. Peter M. Tiersma, *Jury Instructions in the New Millennium,* 36 CT. REV. 28 (1999) [hereinafter *Jury Instructions*]; PETER M. TIERSMA, LEGAL LANGUAGE 231-33 (1999). Studies testing juror comprehension find that jurors may misunderstand or fail to recall as many as half of the instructions they receive. Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases,* 16 LAW & HUM. BEHAV. 539, 593 (1992); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate,* 67 N. C. L. REV., 77, 78 (1988).

Providing jurors with preliminary instructions, as described in Principle 6 C., and equipping each juror with a written copy of the instructions, as described in Principle 14 B., can assist the jury in understanding and applying the law, but only if the instructions are comprehensible. Jury instructions communicate most effectively if they avoid legalese, abstract or unnecessarily formal language. When statutes require judges to use unfamiliar terms, or terms with multiple possible meanings (e.g., "aggravation") in their instructions to the jury, definitions should be provided. Sentence structure should be direct and the instructions should be organized in a logical order. "Case-specific" language should be used in preference to more generic language (e.g., "Mr. Jones" or

"the plaintiff Mr. Jones" rather than "the plaintiff"). *Jury Instructions*, *supra,* at 341; Bradley Saxton, *How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries And Real Trials In Wyoming,* 33 LAND & WATER L. REV. 59 (1998); Shari Seidman Diamond & Judith N. Levi, *Improving Decision On Death By Revising And Testing Jury Instructions,* 79 JUDICATURE 224, 232 (1996); Shari Seidman Diamond, *Instructing on Death, Psychologists, Juries, and Judges,* 48 AM. PSYCHOLOGIST 423, 426 (1993); Reifman et al., *supra,* at 540; Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy*: *Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & LAW 788 (2000); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Instruction Process,* 3 PSYCHOL. PUB. POL'Y. & LAW 589 (1977).

Difficult language and sentence structure are not the only causes of inadequate jury instructions. Jurors have difficulty with instructions that are inconsistent with their intuitions or preconceived notions. Ellsworth & Reifman, *supra,* at 800. Accordingly, courts can increase juror comprehension by addressing such misconceptions directly. For example, it may be useful to alert jurors to the higher standard of proof required in a criminal case than in a civil case by explicitly describing the difference. *See, e.g.*, FEDERAL JUDICIAL CENTER PATTERN CRIMINAL JURY INSTRUCTIONS, Instruction 21 (1987) ("The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.").

Subdivision B.

Subdivision B. is drawn from ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY 15-4.4 (1996), which provides the court with the option of instructing the jury before or after closing arguments. As noted in the commentary to Standard 15-4.4, providing instructions before closing arguments has been criticized because it may cause jurors to forget what law they

were able to comprehend from the charge. On the other hand, providing the instructions prior to closing arguments give counsel the opportunity to explain the instructions by arguing the application of the facts and thereby providing the jury with maximum assistance. In the absence of empirical evidence on the impact of the timing of instructions on jury comprehension, this subdivision recognizes the potential advantages and disadvantages of both approaches.

As suggested in both the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996) and the ABA CIVIL TRIAL PRACTICE STANDARDS (1998), each juror should be provided with a written copy of the jury instructions. Receiving instructions on the law by listening to a judge read them aloud is far from ideal. Reifman et al., *supra*, at 540. Individuals process and retain information better when the information is presented both visually and in an auditory form. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 146 (1988). Thus, providing written instructions for jurors to read as the court charges them on the law can increase their comprehension. Saxton, *supra,* at 110-111. Providing each juror with a copy of instructions during deliberations increases their ability to recall and apply the instructions. TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 88 (1998); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process,* 3 PSYCHOL. PUB POL'Y & L. 589, 626-28 (1997).

Verdict forms are an important part of the legal instructions to the jury. If the verdict forms do not clearly convey the choices that jurors must make in arriving at a verdict, the forms will invite inconsistent verdicts or verdicts that do not reflect juror fact-finding or application of the law. In the course of instructing the jury on the law, the court should explain the choices the jury must make in completing the verdict forms.

Subdivisions C. and D.

Courts should instruct jurors on the procedures for reporting results, including how to complete the verdict forms, how they will

inform the court about their verdict and who will be responsible for announcing the verdict in court. Courts should also remind jurors that they may ask the court for assistance and instruct jurors how to request clarification on particular issues from the court. Juror comprehension can be increased when jurors ask and are provided with help from the court. Reifman et al., *supra,* at 539.

According to subdivision C., courts should make suggestions regarding the process of selecting a presiding juror and the conduct of deliberations. Subdivision D. maintains, however, that the selection of a presiding juror and determining how to conduct jury deliberations should be left to the jurors. Hence, these subdivisions acknowledge that it is up to the jury to decide whether or not to follow the court's suggestions.

In accordance with Standards 16(c)(ii) and 18(a) of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993), courts should advise that the presiding juror generally chairs the deliberations and ensures a complete discussion before any vote. The court should note that each juror should have an opportunity to be heard on every issue and should be encouraged to participate. Jurors should be told that they should not surrender an individual opinion or decision merely to return a verdict. The court should further inform the jurors that they may be asked, when the verdict is returned, if the verdict is in fact their individual verdict. By providing those suggestions, courts are explaining the functions of the presiding juror and deliberations. Those explanations serve to equip the jurors for the task at hand. Studies have shown that in selecting a presiding juror, jurors have considered such factors as previous experience, including relevant expertise, as well as socioeconomic status, who spoke first, professional occupation and location at the deliberation table. Because the presiding juror can affect the quality of deliberations, juror understanding of the individual's functions may assist them in considering more relevant factors. *See* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury,* 26 LAW & SOC'Y REV. 513, 548-53 (1992); Fred L. Strodtbeck & Richard M. Lipinsky, *Becoming First Among Equals: Moral Considerations in Jury Foreman Selection,* 49 J. PERSONALITY & SOC. PSYCHOL. 927, 934-36 (1985).

The American Judicature Society's BEHIND CLOSED DOORS: A RESOURCE MANUAL TO IMPROVE JURY DELIBERATIONS (1999) ("MANUAL") offers a brief set of suggestions on selecting a presiding juror and organizing deliberations, including (1) the responsibilities of the presiding juror; (2) potential ways to facilitate discussion, participation and attention to the relevant evidence and instructions, and (3) timing and methods of voting. The MANUAL makes it clear that the jury is free to select its own method of deliberating, but jurors who participated in a pilot study of the MANUAL, reported that they found the advice in the MANUAL to be helpful.

PRINCIPLE 15—COURTS AND PARTIES HAVE A DUTY TO FACILITATE EFFECTIVE AND IMPARTIAL DELIBERATIONS

A. In civil cases of appropriate complexity, and after consultation with the parties, the court should consider the desirability of a special verdict form tailored to the issues in the case. If the parties cannot agree on a special verdict form, each party should be afforded the opportunity to propose a form and to comment upon any proposal submitted by another party or fashioned by the court. The court should consider furnishing each juror with a copy of the verdict form when the jury is instructed and explaining the form as necessary.

B. Exhibits admitted into evidence should ordinarily be provided to the jury for use during deliberations. Jurors should be provided an exhibit index to facilitate their review and consideration of documentary evidence.

C. Jury deliberations should take place under conditions and pursuant to procedures that are designed to ensure impartiality and to enhance rational decision-making.

1. The court should instruct the jury on the appropriate method for asking questions during deliberations and reporting the results of its deliberations.

2. A jury should not be required to deliberate after normal working hours unless the court after consultation with the parties and the jurors determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.

D. When jurors submit a question during deliberations, the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so.

E. A jury should be sequestered during deliberations only in the rarest of circumstances and only for the purposes of protecting the jury from threatened harm or insulating its members from improper information or influences.

F. When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party

or upon the court's own motion. The poll should be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If the poll discloses that there is not that level of concurrence required by applicable law, the jury may be directed to retire for further deliberations or may be discharged.

Comment

Principle 15 emphasizes the importance of effective and impartial juror deliberations to the success of the jury trial system in both civil and criminal cases. To that end, it is designed to facilitate juror deliberations and to ensure that any external impediments to the jury's ability to consider evidence are removed.

Principle 15 recognizes that jury deliberations are by nature a human process over which courts ultimately have limited actual control. Even under ideal conditions and given proper, clear, instructions, jurors come to deliberations with individual values, opinions and beliefs that influence the deliberation process. *See generally* Dennis J. Devine et al., *Jury Decision Making: 45 years of Empirical Research on Deliberating Groups,* 7 PSYCHOL. PUB. POL'Y, & LAW 622 (2001) (collecting data).

Subdivision A.

This subdivision is drawn from Standard 6 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

Subject to governing law, the court has the discretion to submit any of a broad array of potential verdict forms to the jury. This subdivision recognizes that "[c]hoosing among these alternatives is not subject to scientific precision; each has desirable and undesirable features." NEW YORK STATE BAR ASSOCIATION FEDERAL COURTS COMMITTEE, IMPROVING JURY COMPREHENSION IN COMPLEX CIVIL LITIGATION 31 (July 1988), NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § VI-10 (G. Thomas Munsterman et al., eds. 1997). Accordingly, counsel should be permitted to be heard on this subject.

To assist the court and expedite the trial, the parties should be encouraged to agree on a verdict form. The court may provide

sample verdict forms to counsel to expedite the process. If the parties come to agreement, and the agreed form is neither defective under applicable law nor otherwise inappropriate, the court should ordinarily furnish that form to the jury. If the parties disagree, the court should receive submissions from the parties and fashion an appropriate form of verdict, permitting the parties to be heard on the judicially-crafted form.

The purpose of providing all jurors with copies of the verdict form is to assist them with their deliberations. It will also make it easier for each juror—especially if a special verdict is involved—to answer questions if the jury is polled at the end of the case. The verdict form may be included within juror notebooks, if those are provided.

Traditionally, use of special verdict forms in the guilt determination phase of criminal trials has been prohibited on constitutional grounds. See *United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969) ("There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step."); *State v. Surrette*, 544 A.2d 823, 825 (N.H. 1988) (such use deprives defendant of impartial jury). Supreme Court decisions requiring juries instead of judges to find the existence of special circumstances that may increase the authorized punishment beyond that called for by the underlying offense of which the defendant has been convicted (e.g., *Blakely v. Washington*, 124 S. Ct. 2531 (2004)) may bring the special verdict form back to criminal litigation. See Prescott & Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, U. Mich. Olin Center for Law and Econ., Paper #05-004 (2005), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=680682.

Subdivision B.

This subdivision is drawn from Standard 7 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

This subdivision is animated by the conviction that jurors should ordinarily be permitted to review the tangible evidence during their deliberations. If the evidence is voluminous, the court may invite counsel to identify those exhibits that they wish

initially be delivered to the jury room. If certain evidence is potentially dangerous to the jurors, the court may prefer to substitute, at least initially, a photograph for the jurors' use.

This subdivision recognizes that aids may be necessary for the jury to review evidence efficiently—or, in some cases, at all—during deliberations. See ABA SPECIAL COMMITTEE ON JURY COMPREHENSION, JURY COMPREHENSION IN COMPLEX CASES 29-31 (1989); ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM 100 (1984). The one category of aid considered by the subdivision is an index to facilitate retrieval and review of documents. Other categories of aids should be considered as well, in light of developing technology and Subdivision C.

Subdivision C.

This subdivision is drawn from Standard 18 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993).

It is designed to set conditions for jury deliberations that attend to jurors' individual needs, reduce or eliminate confusion and create a minimum of disruption to jurors' occupations and personal lives. Setting appropriate conditions for deliberations is critical not only to ensure fair deliberations in a particular case, but also to the overall effectiveness of the jury system, as the conditions of deliberations bear directly on jurors' willingness and capacity to serve.

This subdivision recognizes that most jurors will not have had prior experience as jurors. As a result, the court should facilitate deliberations by ensuring that jurors are instructed regarding the proper method of asking questions during deliberations and reporting deliberation results. These instructions should be given on the record prior to deliberations and in language understandable to persons unfamiliar with the legal system.

This subdivision recognizes that courts have broad discretion with regard to the conduct of jury deliberations. The subdivision encourages courts to limit the extension of juror deliberations into the evening and weekend hours, due to the potential adverse impact that prolonged deliberations sessions may have both on the lives of jurors and on the rational deliberative process they are

charged with carrying out. *See State v. Green,* 121 N.W.2d 89 (Iowa 1963) (reversing conviction where verdict reached after jury deliberated for 27 hours without sleep); *Commonwealth v. Clark,* 170 A.2d 847 (Pa. 1961) (reversing conviction based on verdict returned at 5:25 AM following continuous deliberations).

To assess the impact of extending deliberations beyond normal working hours, courts should consider (1) the views and preferences of jurors and counsel, including the impact of extended deliberations on juror religious beliefs or practices; (2) the length of time the jury has already been deliberating; (3) the likelihood that jurors would be exposed to improper information or influences; (4) the complexity of the case and (5) the presence of jury fatigue.

Subdivision D.

Subdivision D. is intended to encourage the courts to respond to juror questions during deliberations or inform them why the court cannot do so.

This subdivision is premised on the notion that when courts provide a meaningful response to juror questions, juror frustration is reduced and juror experience with the system is more positive. Moreover, empirical data suggest that when courts provide responsive answers or careful explanations for their inability to do so, jurors are more likely to follow judicial instructions regarding a range of issues that the legal system considers irrelevant, but that jurors, nonetheless, find of interest, such as the effect of insurance and attorney fees on net verdicts in civil cases. *See* Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1887-1905 (2001).

Subdivision E.

This subdivision is drawn from Standard 19 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993), but has strengthened limitations on the use of sequestration.

This subdivision prefers that trial courts be granted discretion to determine when sequestration is appropriate, rather than being compelled to order sequestration pursuant to statutory mandate.

This view is consistent with the evolution of the law in this area and reflects current practice in most jurisdictions. This is true even in states such as New York, where sequestration was once prevalent due to statutory requirements. *See Separation and Sequestration of Deliberating Juries in Criminal Trials (*April 1, 1999), *available at* www.courts.state.nv.us/press/old keep/seqreport.shtml.

This subdivision is also informed by recent scholarship and experience suggesting that the costs of sequestration and its demonstrated adverse impact on the lives of jurors weigh against its use in almost all cases. *See* Marcy Strauss, *Sequestration,* 24 AM. J. CRIM. L. 63 (1996); *see also* James P. Levine, *The Impact of Sequestration on Jurors,* 79 JUDICATURE 266 (1996). At the same time, the subdivision is flexible enough to allow for sequestration when warranted by considerations of juror safety and outside media influence, particularly in high profile cases. *See* TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 68 (1998). When sequestration is necessary, courts should consider limiting it to particular phases of trial, such as deliberations, where juror's physical safety and subjection to outside influence can have the most impact.

In those cases where sequestration is warranted or required, courts should make it as "juror-oriented" as possible by (1) involving jurors in the drafting of sequestration rules; (2) evaluating rules for their impact on the dignity and privacy of jurors; (3) monitoring actual conditions through the use of an ombudsman or similar representative to bring jury concerns to the court; (4) adopting a system of post-trial counseling to facilitate juror transition to their former lives. Strauss, *supra,* at 119-20.

Subdivision F.

This subdivision is drawn from Standard 15-5.6 of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996).

Polling the jury is derived from common law tradition, and the procedures for polling described in this subdivision are consistent

with practice in most jurisdictions. This subdivision envisions individual questioning of jurors to avoid issues of coercion that may arise if the polling is done with a collective group.

This subdivision provides that the judge may either direct the jury to retire for further deliberations or discharge the jury when polling reveals a lack of requisite concurrence. This approach is taken from Rule 31(d) of the Federal Rules of Criminal Procedure and is in direct contrast to most state statutes and court rules, which generally permit the trial judge only to direct the jury to retire for additional deliberations. This subdivision represents a preference for the federal approach, which gives the court power to discharge the jury where coercion is evident or the court is otherwise aware that further deliberations are unlikely to result in a verdict with the appropriate level of concurrence.

PRINCIPLE 16—DELIBERATING JURORS SHOULD BE OFFERED ASSISTANCE WHEN AN APPARENT IMPASSE IS REPORTED

A. If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.

B. If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

C. If there is no reasonable probability of agreement, the jury may be discharged.

Comment

Subdivision A. is the lone subdivision of this Principle that is not derived from previous ABA Standards. Instead, it is drawn from Rule 39(h), Arizona Rules of Civil Procedure, and Rule 22.4, Arizona Rules of Criminal Procedure, which allow the court to offer assistance in the form of additional instructions or further proceedings in the event the jury announces an impasse in its deliberations. Subdivisions B. and C. pertain to ordering further deliberations and dealing with deadlocked deliberations and are derived in significant part from Standard 15-5.4. of the ABA CIVIL TRIAL PRACTICE STANDARDS.

Subdivision A.

Subdivision A. urges the court to provide assistance to deliberating jurors who request help on the theory that such assistance will improve the chances of a verdict and avoid needless mistrials. The jury's announcement of an impasse is required; otherwise the

court is not justified in offering assistance. *See State v. Huerstel*, 75 P.3d 698 (Ariz. 2003). Moreover, jurors who are allowed to define the issues that divide them and receive appropriate responses thereto, will more likely reach verdict, and one that is accurate. The court's invitation following notice of jury impasse, should not be coercive, suggestive or unduly intrusive. Specifically, the jury should not be made to feel that the court's actions are intended to force a verdict. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns at all. *See* ARIZ. R. CIV. P. 39(h), cmt.; ARIZ. R. CRIM. P. 22.4, cmt.; NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS § VI-11 (G. Thomas Munsterman et al. eds. 1997). *See also Withers v. Ringlein*, 745 F. Supp. 1272, 1274 (E.D. Mich. 1990); ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12: REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFECTIVE USE OF JURIES (1994); B. Michael Dann, "*Learning Lessons*" *and* "*Speaking; Rights*": *Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1269-77 (1993).

This procedure, when carefully guided by wise judicial discretion, does not unduly invade the sanctity of jury deliberations or transform the trial judge to the status of fact finder. *But see United States v. Yarborough*, 400 F.3d 17 (D.C. Cir. 2005). Rather, it strikes a careful balance between the confidentiality of deliberations and the importance of responding to the jury's expressed request for guidance and the undoubted values of avoiding needless mistrials on account of deadlocked juries and assisting the jury in reaching well-informed verdicts. It is also consistent with the long line of cases allowing judges to reopen jury deliberations in criminal cases for additional proceedings. *See* M. C. Dransfield, Annotation, *Propriety of Reopening Criminal Case in Order to Present Omitted or Overlooked Evidence, after Submission to Jury but Before Return of Verdict*, 87 A.L.R. 2d 849 (1963).

Subdivision B.

Subdivision B. provides that a trial court should be able to send the jury back for further deliberations notwithstanding its

indication that it has been unable to agree. The general view is that a court may send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged. H. H. Hansen & D. E. Buckner, Annotation, *Time Jury May be Kept Together on Disagreement in Criminal Case*, 93 A.L.R. 2d 627, 639 (1964); *DeVault v. United States*, 338 F.2d 179 (10th Cir. 1964); *People v. Boyden*, 4 Cal. Rptr. 869 (1960). Statutes in a few states limit the number of times a court can order a disagreeing jury to continue deliberations. *See, e.g.*, S.C. CODE § 14-7-1330 (1975). That view has not been adopted here, however, as it is believed that a jury should not be permitted to avoid a reasonable period of deliberation merely by repeated indications that it is unhappy over its inability to agree.

A judge should not require a jury to deliberate for an unreasonable length of time or for unreasonable intervals, or threaten a jury with the prospect of such unreasonably lengthy deliberations. The length of time a jury may be kept deliberating is a matter within the discretion of the trial judge; abuse of that discretion requires reversal. The reasonableness of the deliberation period should not be fixed by an arbitrary period of time, but should depend upon such factors as: the length of the trial; the nature or complexity of the case; the volume and nature of the evidence; the presence of multiple counts or multiple defendants; and the jurors' statements to the court concerning the probability of agreement. Annotation, 93 A.L.R. 2d at 627.

Subdivision B. does not recommend an absolute bar on a trial judge telling a jury how much longer it will be required to deliberate. There is a split of authority on the question of whether such action is proper. *Compare Wishard v. State*, 115 P. 796 (Okla. 1911) *with Butler v. State*, 207 S.W.2d 584 (Tenn. 1948). The argument against permitting such a communication is that minority jurors may surrender to the majority simply to avoid having to remain the announced time or that a contrary or disagreeable juror may be encouraged to "stick it out" to the indicated deadline. *Wade v. State*, 155 Miss. 648, 124 So. 803 (1929). However, if the time announced is not unduly long, these do not seem to be great risks. *See, e.g.*, *Butler v. State*, 207 S.W.2d 584 (Tenn. 1948).

Subdivision C.

Although the common law rule was to the contrary, subdivision C. provides that a trial judge has discretionary power to discharge a jury in any trial without the consent of either party when, after sufficient and reasonable time for deliberation, it cannot agree on a verdict. *See, e.g.*, *United States v. Shavin*, 287 F.2d 647 (7th Cir. 1961); *People v. Mays*, 179 N.E. 2d 654 (Ill. 1962): *see also Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971). Subdivision C. permits discharge when "it appears that there is no reasonable probability of agreement."

The language of this subdivision—or similar language—is common in statutes and rules of court. *See, e.g.*, ARIZ. R. CRIM. P. 22.4; ARK. CODE. ANN, § 43-2140 (1977); CAL. PENAL CODE § 1140 (1970); OHIO REV. CODE ANN. § 2945.36 (1974); TEX. CODE CRIM. PROC. art. 36.31 (1966). Court decisions likewise take the view that a trial judge should not discharge a jury merely because it reports that it has not been able to agree, but instead should determine whether there is a reasonable prospect of its being able to agree. Carus Icenogle, *The Menace of the "Hung Jury*, " 47 A.B.A. J. 280 (1961). One way of making this determination is through the questioning of jurors. The particular circumstances of the case should also be considered. Relevant factors include: the length of deliberation, *People v. Caradine*, 235 Cal App. 2d 45, 44 Cal. Rptr. 875 (1965); the length of the trial, *United States v. Fitz Gerald*, 205 F. Supp. 515 (N.D. Ill. 1962); and the nature or complexity of the case. *People v. Mays*, 179 N.E.2d 654 (Ill. 1962).

Post-Verdict Activity

PRINCIPLE 17—TRIAL AND APPELLATE COURTS SHOULD AFFORD JURY DECISIONS THE GREATEST DEFERENCE CONSISTENT WITH LAW

Trial and appellate courts should afford jury decisions the greatest deference consistent with law.

Comment

Principle 17 is premised on the notion articulated in the Seventh Amendment to the Constitution that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The prohibition contained in the Seventh Amendment has not been interpreted as prohibiting review. In both civil and criminal cases, appropriate review has been accepted as a necessary part of the judicial process. In recent years, commentators have expressed concern that appellate courts (particularly in civil cases) have arrogated to themselves an authority to review that treats jury verdicts as fair game for the most exacting scrutiny. This approach appears to go well beyond that envisioned by the Seventh Amendment and amounts, in some cases, to a second-guessing of the jury. Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts,* 1989 WIS. L. REV. 237.

The Supreme Court of the United States has cautioned against such an approach in *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415 (1996); *see also* Hetzel v. Prince William Co., 523 U.S. 208 (1998) (per curiam). This Principle is intended to reiterate that caution. Nothing in the Principle is intended to change the developed law regarding grounds for challenging a jury verdict in a capital case. *See, e.g., Wisehart v. Davis,* 408 F.3d. 321 (7th Cir. 2005) (juror affidavit necessitated further inquiry into whether jury had improperly considered extraneous evidence that defendant took polygraph examination); *Fullwood v. Lee*, 290

F.3d 663 (4th Cir. 2002) (relying on juror affidavit to order evidentiary hearing on habeas claim that extraneous evidence prejudiced jury at penalty phase); *Romine v. Head*, 253 F.3d 1349, 1362-63 (11th Cir. 2001) (juror testimony admitted regarding effect on jury of prosecution argument).

PRINCIPLE 18—COURTS SHOULD GIVE JURORS LEGALLY PERMISSIBLE POST-VERDICT ADVICE AND INFORMATION

A. After the conclusion of the trial and the completion of the jurors' service, the court is encouraged to engage in discussions with the jurors. Such discussions should occur on the record and in open court with the parties having the opportunity to be present, unless all the parties agree to the court conducting these discussions differently. This standard does not prohibit incidental contact between the court and jurors after the conclusion of the trial.

B. Under no circumstances should the court praise or criticize the verdict or state or imply an opinion on the merits of the case, or make any other statements that might prejudice a juror in future jury service.

C. At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.

D. Unless prohibited by law, the court should ordinarily permit the parties to contact jurors after their terms of jury service have expired, subject, in the court's discretion, to reasonable restrictions.

E. Courts should inform jurors that they may ask for the assistance of the court in the event that individuals persist in questioning jurors, over their objection, about their jury service.

Comment

This Principle is, in large measure, drawn from Standard 16 of the ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) and from Standard 8 of the ABA CIVIL TRIAL PRACTICE STANDARDS (1998).

This Principle is based on the premise that jurors benefit from a post-verdict discussion with the court following the completion of their service. Post-verdict discussion should address the jurors' questions and concerns regarding confidentiality, media access, post-service assistance and other relevant information.

Subdivision A.

Subdivision A. urges that such discussions be on the record with an opportunity for counsel to be present, if appropriate. Attorney participation is helpful to jurors in discussing such issues as post-service contacts with counsel, limitations placed on such contacts, and permissible topics of discussion following the completion of their service. The keeping of a record during these discussions, although more formal, maintains uniformity throughout the jurors' service and allows the court to have a record of jurors' questions and matters of concern with regard to their service and the trial process in general.

Subdivision B.

Subdivision B. recognizes the propensity of jurors to look to the judge for an opinion about their verdict. Often, jurors are looking for an affirmation that their decision was the correct one, doing so by seeking any sign, verbal or nonverbal, that the judge may provide in this respect. It is important that the judge remain the neutral party, neither praising nor criticizing the verdict. Criticizing the verdict can be extremely troubling for the jurors. Judges are encouraged to express their gratitude to the jurors for their service and refrain from commenting directly on the verdict. NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS Appendix 12 (G. Thomas Munsterman et al. eds. 1997) [hereinafter INNOVATIONS].

Subdivision C.

Subdivision C. illustrates the established practice of instructing the jury on their right to discuss or not discuss the case with anyone, including the press. Most jurors have not been through the trial process before, and may be unprepared to deal with media requests and related public attention. Jurors should be instructed that they do not have to speak with anyone regarding their service, if that is their preference; however, they are free to speak with the media, counsel, family members or others, if they so choose. Judges may suggest that jurors discuss among themselves how

best to handle media requests. Judges may ask jurors to respect the deliberative process and the candor of their fellow jurors. TIMOTHY R. MURPHY ET AL., NATIONAL CENTER FOR STATE COURTS, MANAGING NOTORIOUS CASES 94-97 (1998); *United States v. Giraldi*, 858 F.Supp. 85 (S.D. Tex. 1994).

Subdivision D.

Subdivision D. addresses contact between jurors and counsel after the jurors' service is complete. As a general rule, unless prohibited by the law of the jurisdiction, the court should exercise its discretion in favor of permitting counsel to contact jurors after their terms of jury service have expired. *See generally Delvaux v. Ford Motor Co.*, 764 F.2d 469, 471 (7th Cir. 1985) (setting forth considerations both in favor and opposed to such contacts). Judges may explain that post-service discussions with counsel may be helpful to the attorneys professionally by identifying positive and negative elements of their trial strategy and performance. Jurors should also be instructed as to any limitations imposed by the court or other governing body on such contacts designed to provide jurors protection from harassment. *See, e.g.*, ABA MODEL CODE OF PROFESSIONAL CONDUCT 4.4; ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (prohibiting lawyers from contacting jurors for the purpose of harassment or embarrassment).

Subdivision E.

Subdivision E. emphasizes the protection of jurors' privacy rights after the completion of their service. Jurors should be informed by the court of their right to be free from the harassment of the media, counsel, parties or other individuals. The court should provide specific instructions regarding how one may seek relief. Providing such information is reassuring to jurors and instills a sense that the court genuinely cares about their well-being, in turn fostering positive feelings regarding their service and the judicial process as a whole. INNOVATIONS, *supra,* at § VII-1.

PRINCIPLE 19—APPROPRIATE INQUIRIES INTO ALLEGATIONS OF JUROR MISCONDUCT SHOULD BE PROMPTLY UNDERTAKEN BY THE TRIAL COURT

A. Only under exceptional circumstances may a verdict be impeached upon information provided by jurors.

1. Upon an inquiry into the validity of a verdict, no evidence should be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

2. The limitations in A.1 above should not bar evidence concerning whether the verdict was reached by lot or contains a clerical error, or was otherwise unlawfully decided.

3. A juror's testimony or affidavit may be received when it concerns:

a. Whether matters not in evidence came to the attention of one or more jurors; or

b. Any other misconduct for which the jurisdiction permits jurors to impeach their verdict.

B. The court should take prompt action in response to an allegation of juror misconduct.

1. Upon receipt of an allegation of juror misconduct, the court should promptly inform the parties and afford them the opportunity to be heard as to whether the allegation warrants further enquiry or other judicial action.

2. Parties should promptly refer an allegation of juror misconduct to the court and to all other parties in the proceeding.

3. If the court determines that the allegation of juror misconduct warrants further inquiry, it should consult with the parties concerning the nature and scope of the inquiry, including:

a. Which jurors should be questioned;

b. Whether the court or the parties should ask the questions; and

c. The substance of the questions.

4. **If the court ascertains that juror misconduct has occurred, it should afford the parties the opportunity to be heard as to an appropriate remedy.**
5. **If the allegation of juror misconduct is received while the jury is deliberating, the recipient must ensure as quickly as possible that the court and counsel are informed of it, and the court should proceed as promptly as practicable to ascertain the facts and to fashion an appropriate remedy.**

Comment

This Principle is drawn from the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (1996) and ABA CIVIL TRIAL PRACTICE STANDARDS (1998). Subdivision A. is substantially similar to Section 15-5.7 ("Impeachment of the Verdict") of the ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY and subdivision B. is substantially similar to Standard 9 of the ABA CIVIL TRIAL PRACTICE STANDARDS.

Subdivision A.

Trial judges are often confronted with requests to question former jurors about statements, conduct, events or conditions affecting the validity of a verdict. This subdivision addresses the issue of whether a court should receive evidence from a juror to impeach the verdict. The general rule is that "a juror's testimony or affidavit is not receivable to impeach his own verdict." 8 WIGMORE, EVIDENCE § 2345 (McNaughton rev. 1961). This rule reflects the policy decision that to intrude into the sanctity of the jury process would create a chilling effect on deliberations, as well as undermine the finality of jury determinations.

In a range of cases, however, inquiry into the circumstances surrounding a jury's deliberations and verdict may be necessary to adequately protect a litigant's rights. *See, e.g., Tanner v. United States*, 483 U.S. 107 (1987) (discussing circumstances under which inquiry into juror misconduct may be necessary to protect a criminal defendant's Sixth Amendment right to fair trial); *Jacob v. City of New York,* 315 U.S. 752, 752-53 (1942) (explaining

that the right to jury trial in civil cases is such "a basic and fundamental feature of our system of federal jurisprudence" that it "should be jealously guarded by the courts"); *see* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.15.1, and cmt. (rev. ed. 2003). This raises the question of whether, after the jury has been discharged, it is improper for counsel to interview jurors and how counsel should treat information that might be used to impeach a verdict. Some courts have held that it is improper to interview the jurors in an attempt at impeachment.

Subdivision A. does not impose a blanket no-impeachment rule. Rather, it recommends against receipt of evidence "to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined" upon an inquiry into the validity of a verdict. Nothing in this subdivision is intended to change existing law with respect to the admission of evidence regarding the mental processes by which a verdict was determined in the context of a capital case. S*ee, e.g.*, *Wisehart v. Davis,* 408 F.3d. 321 (7th Cir. 2005) (juror affidavit necessitated further inquiry into whether jury had improperly considered extraneous evidence that defendant took polygraph examination); *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), (relying on juror affidavit to order evidentiary hearing on habeas claim that extraneous evidence prejudiced jury at penalty phase); *Romine v. Head,* 253 F.3d 1349, 1362-63 (11th Cir. 2001) (juror testimony admitted regarding effect on jury of prosecution argument).

There are, of course, sound reasons for limiting post-trial inquiries into the basis for jury verdicts. These reasons apply even when an individual juror is willing to discuss his or her own misconduct. First, there is concern that relaxation of the restriction would create a danger of fraud and jury tampering. *See State v. Freeman*, 5 Conn. 348 (1824); *King v. United States*, 576 F.2d 432 (2d Cir. 1978); *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir.1975). In addition, it could lead to harassment of jurors and elimination of the confidentiality of jury deliberations. As the Supreme Court pointed out in discussing the dangers:

> Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68 (1915). In addition, substantial dangers are inherent in the attempt to delve into the very thought processes of individual jurors in order to explain how the individual came to his or her decision. *See, e.g., Trousdale v. Texas & N.O.R. Co.,* 264 S.W.2d 489, 493-95 (Tex. Civ. App. 1953) (collecting cases).

Subdivision A. rejects the inclusion of testimony other than that of specific misconduct, whether the testimony is open to corroboration by other jurors or not. Such testimony might include, for example, an expression showing that a juror misunderstood the instructions. *See Perry v. Bailey,* 12 Kan. 539, 545 (1874).

Subdivision A. also bars evidence of "the effect of any statement, conduct, event, or condition upon the mind of a juror" even when the inquiry is for the purpose of showing that a potentially prejudicial occurrence did not influence the verdict. For example, after a coin has been flipped to determine the verdict, a juror involved should not be permitted to testify that his or her subsequent concurrence in the verdict flowed from personal conviction rather than the outcome of the toss. Some court decisions and statutes permit such evidence for purposes of upholding the verdict. *See, e.g., Beakley v. Optimist Printing Co.,* 152 P. 212 (Idaho 1915); *Linsley v. State*, 101 So. 273 (Fla. 1924); GA. CODE ANN. § 110-109 (1973). Both Rule 606(b) of the Federal Rules of Evidence and this subdivision have rejected that view. Inquiry into the thought process of individual jurors carries the same risks and uncertainties whether the attempt is to invalidate or to save the verdict. *See, e.g., Wiedemann v. Galiano*, 722 F.2d 335 (7th Cir. 1983) (excluding juror's testimony whether introduced to support or to impeach the verdict). Rather than engage in speculation as to the thought processes of each individual juror, it is better to determine whether the "capacity for adverse prejudice inheres in the

condition or event itself." *See State v. Kociolek*, 118 A.2d 812, 816 (N.J. 1955).

Finally, it should be emphasized that the restrictions in subdivision A. apply to attempts to impeach a verdict and do not preclude a trial judge from making necessary and appropriate inquiries when an ambiguous or inconsistent verdict has been returned.

To this end, a juror's testimony may be received regarding an alleged clerical error in the verdict. "[J]uror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation or mental processes." *Plummer v. Springfield Terminal Ry. Co.,* 5 F.3d 1, 3 (1st Cir. 1993); *see also Karl v. Burlington Northern Ry. Co.,* 880 F.2d 68, 73-74 (8th Cir. 1989); *Eastridge Dev. v. Halpert Assoc.,* 853 F.2d 772, 783 (10th Cir. 1988).

A verdict may not be reached by lot. Subdivision A. therefore provides for the receipt of evidence when this circumstance is alleged to have occurred in the jury room. A verdict reached by lot should simply not be permitted to stand. Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 371-72 (1958). If a verdict by lot is not permitted, then evidence, including testimony from jurors acting in that case, should be received on the question of whether the verdict was arrived at in that fashion. "[S]ince a determination by lot can hardly ever be established by other than jurors' testimony, it becomes a mere pretense to declare a certain irregularity fatal and yet to exclude all practical means of proving it." 8 WIGMORE, EVIDENCE at § 2354.

Subdivision B.

Not all allegations of juror misconduct are substantial or require examination. A juror's statement that he or she acquiesced in a verdict but did so harboring doubts is facially insufficient to impeach the verdict. In contrast, a juror's statement that jurors consulted an encyclopedia or text book during deliberations will ordinarily necessitate further inquiry.

Whenever an allegation of misconduct is received, it must promptly be brought to the attention of all concerned, regardless of whether the recipient deems the allegation likely to lead to juror disqualification or verdict impeachment. If the jury is still deliberating at the time the allegation is received, time is of the essence to permit the court to decide, on an adequate record, whether a remedy short of mistrial (or disqualification of too many jurors) is available and appropriate.

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